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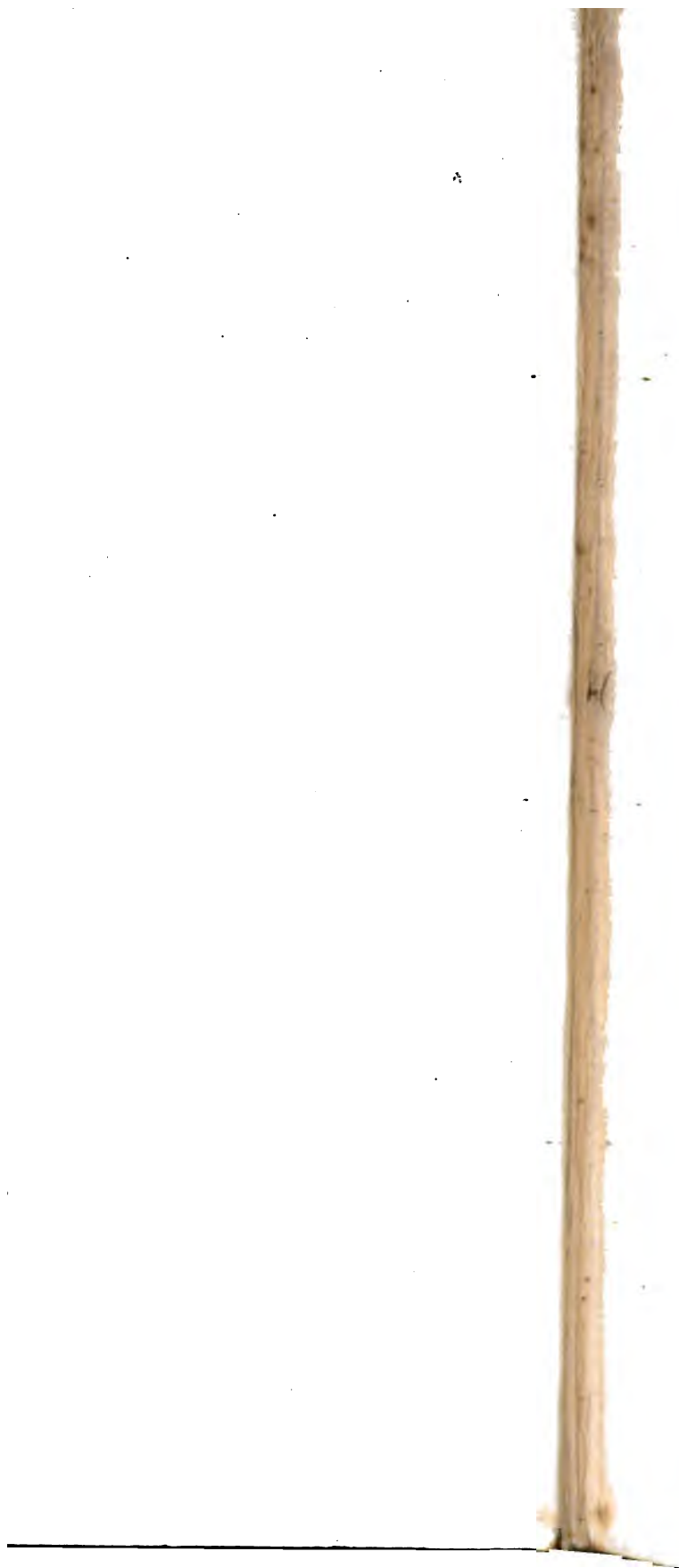
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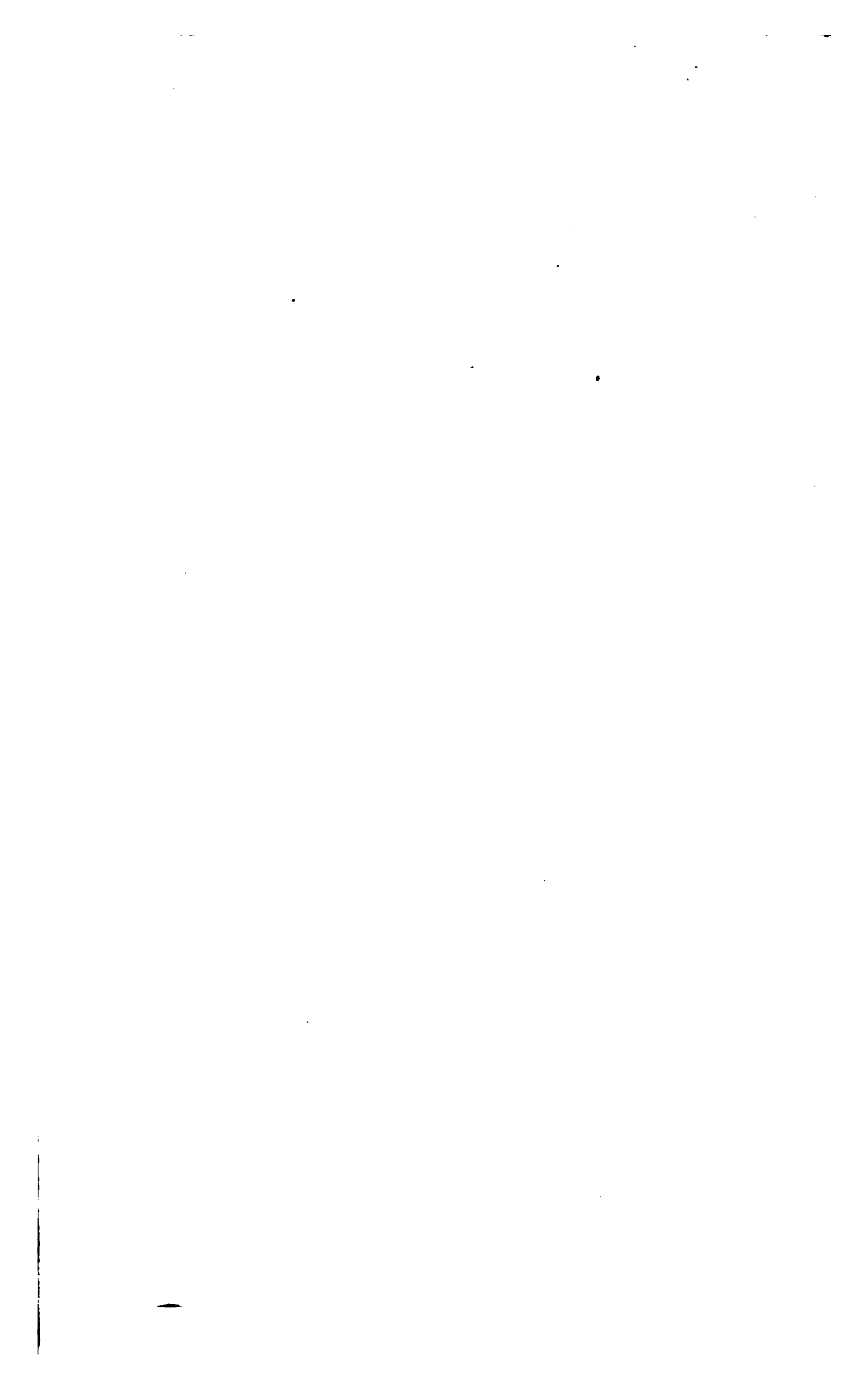
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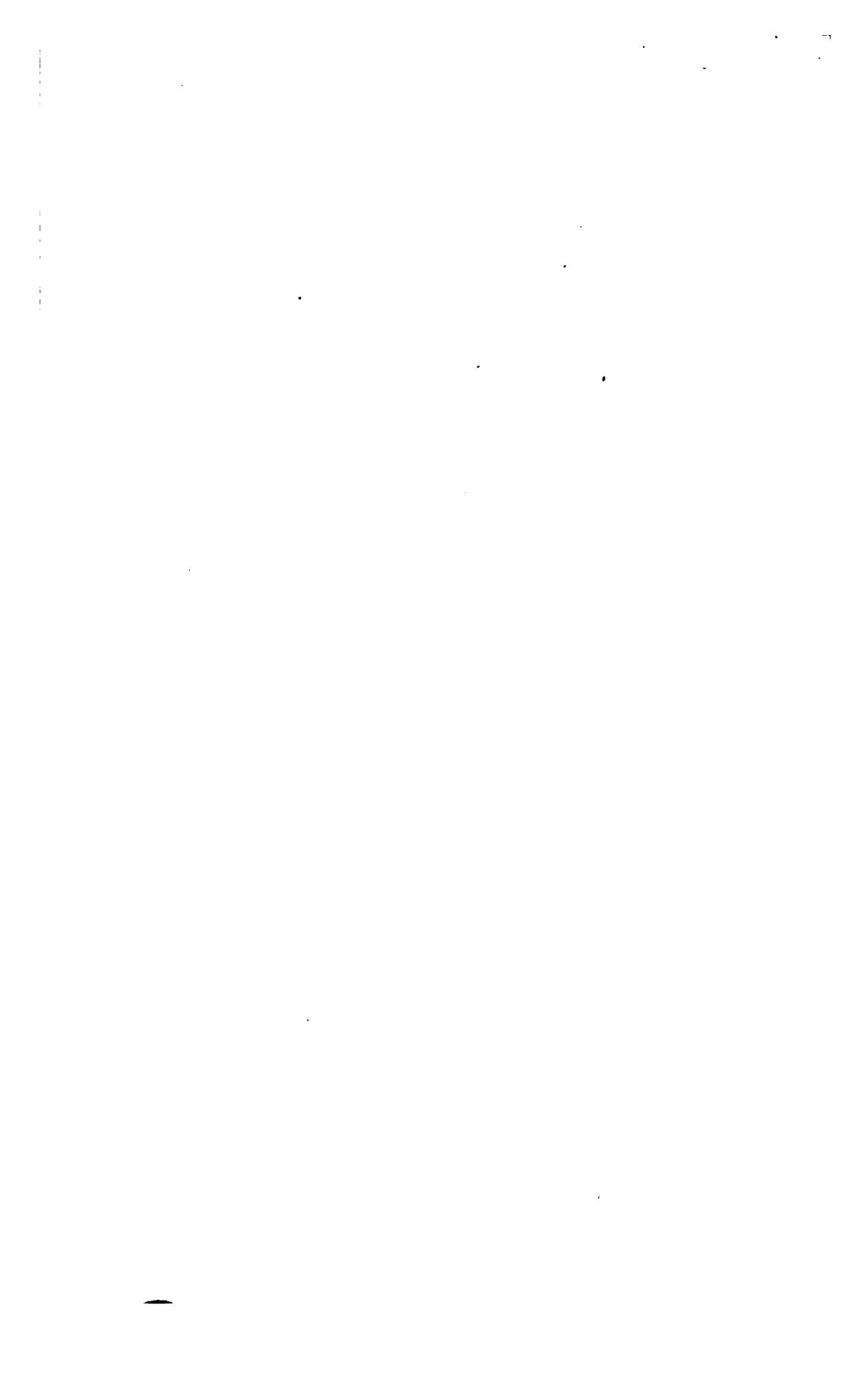
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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

King's Bench Practice Court;

WITH THE

POINTS OF PLEADING AND PRACTICE

DECIDED IN THE COURTS OF

Common Pleas and Exchequer;

FROM

MICHAELMAS TERM, 1834, TO EASTER TERM, 1835.

BY

ALFRED S. DOWLING, ESQ.

OF GRAY'S INN, BARRISTER AT LAW.

VOL. III.

LONDON:

S. SWEET, CHANCERY LANE;

A. MAXWELL, 32, AND STEVENS & SONS, 39, BELL YARD,

Law Booksellers & Publishers;

AND R. MILLIKEN & SON, GRAFTON STREET, DUBLIN.

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ERRATA.



PAGE

- 6, *marginal note, for plaintiff, read defendant; and for defendant, read plaintiff.*
- 66, *marginal note, for issue joined, read plea pleaded.*
- 70, *text, line 2, after ought, insert not.*
- 159, *marginal note, after held, insert not.*
- 170, *second marginal note, after Insolvent Act, for here, read there.*
- 176, *marginal note, lines 20 and 21, for the plaintiff, read he.*
- 183, *marginal note, after held, insert not.*
- 204, *marginal note, line 16, for detainer, read retainer.*
- 259, *note (b), for 3 B. & Ald. 800, read 3 B. & Ald. 598.*
- 516, *note (a), line 2, for s. 4, read s. 1.*
- 531, *marginal note, last word, for time, read term.*
- 573, *marginal note, line 13, for service, read demand.*
- 575, *marginal note, line 6, after made, insert and which.*
- 708, *second marginal note, lines 1 and 2, for an affidavit of notice, read a notice.*
- 777, *marginal note, after H. T., dele 3 &.*

REPORTS OF CASES

DETERMINED ON

POINTS OF PRACTICE.

KING'S BENCH PRACTICE COURT.

Michaelmas Term,

IN THE FIFTH YEAR OF THE REIGN OF WILLIAM IV.

BRIDGMAN v. CURGENVEN.

1834.

GODSON moved for a rule to shew cause why the defendant should not be discharged out of custody on entering a common appearance, on the ground of a defect in the writ of *capias* on which the arrest had been effected. The defect consisted in the omission of the words "indorsed hereon." The words introduced in the body of the writ were, "And we hereby require the said *C. D.* to take notice, that within eight days after the execution hereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him in our Court of —, to the said action, and that, in default of his so doing, such proceedings may be had and taken as are mentioned in the warning *hereunder written or indorsed hereon.*" In the present case, the warning was placed at

If the warning in a *capias* is placed at the foot of the writ, it is only necessary in the body to introduce the words "hereunder written," and not "indorsed hereon" besides.

1834.

BRIDGMAN
v.
CURGENVEN.

the foot of the process, instead of the back of it. The words referred to, however, being in the form of the writ set forth in the schedule of the act, it was necessary that they should be introduced. He cited *Hodgkinson v. Hodgkinson* (a), where the copy of a *capias* served on the defendant, at the time of executing the writ, was directed to the sheriff of "*Middesex*," instead of "*Middlesex*," and the Court discharged the defendant on filing a common appearance. The effect of this case was, that the form given in the schedule of the Uniformity of Process Act must in all cases be strictly pursued.

LITLEDALE, J.—It appears to me, that it cannot be necessary to introduce in all cases the words "hereunder written" or "indorsed hereon." When the warning is indorsed, then the words "indorsed hereon" should be introduced: when the warning is put at the foot of the writ, then the words should be "hereunder written," which words are to be introduced must depend on where the warning is placed. Here the warning was placed at the foot of the writ, and, therefore, the words introduced should be "hereunder written," and the words "indorsed hereon" were properly omitted. The rule prayed, therefore, cannot be granted.

Rule refused.

(a) *Ante*, Vol. 2, p. 535.

TYNDALL and Another v. ULLESHORNE.

If the ground of demurrer stated pursuant to 2 *Reg. Gen. H. T.* 4 *Will. 4*, (Practice Rules), in the margin appears sufficient, the Court will not set the demurrer aside as frivolous.

HENDERSON applied to set aside a demurrer under 2 *Reg. Gen. H. T.* 4 *Will. 4*, (Practice Rules), on the

ground that the statement in the margin of the ground of demurrer was frivolous. The words of the rule are, "In the margin of every demurrer, before it is signed by counsel, some matter of law intended to be argued shall be stated; and if any demurrer shall be delivered without such statement, or with a frivolous statement, it may be set aside as irregular by the Court or a Judge, and leave may be given to sign judgment as for want of a plea" (a). Here the action was assumpsit by two plaintiffs. In the declaration it was alleged, that the defendant was indebted to "the plaintiff," and not to "the plaintiffs," although two plaintiffs were suing. This was the ground of demurrer by the defendant, and that ground was stated in the margin. This was not a good ground for demurrer, as it would appear from the declaration, that there was a sufficient consideration moving from the plaintiff to the defendant. He cited *Innes v. Colquhon* (b), where the Court held, that the want of a precise allegation in an avowry, that the plaintiff was tenant to the avowant, is not fatal if it can otherwise be collected from the avowry that the plaintiff was such tenant. From this it would appear, that the ground of demurrer was frivolous, and, therefore, that it ought to be set aside.

1834.
 TYNDALL
 v.
 ULLESHORNE.

LITLEDALE, J.—It appears to me that this is a good ground of demurrer, and, therefore, that the statement of it in the margin is not frivolous.

Rule refused.

(a) Dowling's Prac. p. 125.

(b) 5 M. & P. 63; 7 Bing. 265.

1834.

LORD v. CROSS.

Where a judgment has been obtained in the Court of *Common Pleas* of the County Palatine of *Lancaster*, it is necessary, in order to issue execution out of a superior Court, that it should appear that the defendant has removed himself and effects out of the jurisdiction.

KNOWLES moved for leave to issue execution on a judgment obtained against the defendant in the Court of *Common Pleas* of the County Palatine of *Lancaster*, on the ground of the defendant having removed out of the jurisdiction. His affidavit did not state, according to the provisions of the 33 *Geo. 3*, c. 68, and the forms given in *Tidd's Forms*, that the defendant had removed himself out of the jurisdiction, and that he had left no effects in the county of *Lancaster*. This, he submitted, was unnecessary according to the provisions contained in the 4 & 5 *Will. 4*, c. 62, s. 31, which were, "it shall and may be lawful for any of the superior Courts at *Westminster*, upon a certificate from the prothonotary of the said Court of *Common Pleas* at *Lancaster*, or his deputy, of final judgment obtained in any such action, to issue a writ or writs of execution thereupon, for the amount of such judgment and the costs of such writ or writs and certificate, to the sheriff of any county, city, liberty, or place, against the person or persons or goods of the party or parties against whom such final judgment shall have been obtained, in such manner as upon judgments obtained in any of the said Courts at *Westminster*." The terms of this act were different from those of the former one, and had no reference to them. If, therefore, the provisions of the latter act were complied with, the plaintiff would be entitled to issue execution. He was prepared with the certificate mentioned in the statute; and that, he submitted, was sufficient.

LITLEDAL, J.—Although the latter terms of the section to which you have referred are as you state, yet there are words in the commencement of this section which shew that, as under the former act, it is still necessary to shew

that the defendant has removed out of the jurisdiction. The words are, "that whenever a plaintiff or defendant, in any action or suit in which judgment shall be recorded in the said Court of *Common Pleas* at *Lancaster*, shall remove his person or goods or chattels from out of the jurisdiction of the said Court of *Common Pleas* at *Lancaster*, it shall and may be lawful for any of the superior Courts at *Westminster*, &c." In substance the words of the latter provision are the same as those of the former act. Unless the defendant has removed himself and effects out of the jurisdiction, this Court cannot interfere.

1834.

LORD
v.
CROSS.

Knowles.—If the defendant is not out of the jurisdiction, the writ of execution will be of no use to the plaintiff.

LITLEDALE, J.—That is of no consequence. The statute requires that the defendant should have removed himself out of the jurisdiction, before this Court can interfere. The statement to that effect must be introduced into the affidavit on which the application is founded.

Rule refused.

DOE dem. GORE v. ROE.

V. WILLIAMS moved for judgment against the casual ejector. The peculiarity in the case was, that the declaration was intitled of *Trinity* Term, 6 *Will. 4*, which, of course, was an impossible day, it not having as yet arrived. The notice at the foot of the declaration was dated 20th *October*, 1834; and therefore it must be clear to the tenant in possession that he must appear in *Michaelmas* Term in the present year. The variance, therefore, he submitted was immaterial.

The statement of a term not yet arrived, in intitling a declaration in ejectment, is immaterial, if sufficient information as to the time of appearance is given in the notice.

1834.

DOE
d.
GORE
v.
ROE.

LITLEDALE, J.—I think that the date in the notice at the foot of the declaration cures the defect in the intitling of it. You may, therefore, take your rule.

Rule granted.

FRY v. WILLS.

Where a defendant is guilty of laches in declaring the plaintiff is not deprived of his claim to security for costs by obtaining time to plead.

STARR shewed cause against a rule *nisi* for security for costs, the plaintiff being in *America*. The plaintiff sued out his writ in the month of *June* last, to which the defendant duly appeared. The plaintiff did not declare till the end of the month of *October*. The defendant then took out a summons for further time to plead, and afterwards obtained the present rule for security for costs, although it was shewn by the affidavits that the defendant knew of the plaintiff's absence from the country before he obtained time to plead. He contended that the present application was too late, the defendant having taken a fresh step in the cause, namely, obtaining further time to plead, when he knew the plaintiff to be out of *England*. This was contrary both to the cases previous to the rule of H. T. 2 *Will.* 4, s. 98 (a), and to that rule. He cited *Duncan v. Stint* (b), where, on an application to obtain security for costs, the plaintiff being abroad, it appeared that the defendant, after a knowledge that the plaintiff was abroad, had pleaded. The Court there observed, that, "where a cause is pending, a party, if he means to apply for security for costs, must take no step after he knows the plaintiff is out of *England*; for, a defendant ought not to wait until expense has been necessarily incurred, which must frequently be the case, particularly in actions of trespass and replevin." On the authority of that case, it must be clear that the defendant, by applying for time to plead,

(a) *Ante*, Vol. 1, p. 197.

(b) 5 B. & Ald. 702.

which was in fact taking a fresh step in the cause, after a knowledge of the plaintiff being absent from *England*, had deprived himself of his claim to security for costs. The rule of *Hilary* Term was in these terms: "an application to compel the plaintiff to give security for costs must in ordinary cases be made before issue joined." This rule did not at all interfere with the necessity imposed on defendants to apply before a fresh step is taken, although it prohibited applications after issue joined. The present rule, therefore, ought to be discharged.

1834.
 FRY
 v.
 WILLS.

W. H. Watson, in support of the rule, was stopped by the Court.

LITLEDALE, J.—The language of the Court in the case of *Duncan v. Stint* is very general, and cannot be taken to apply necessarily to all cases. I think the rule of *Hilary* Term gives the Court a discretion, although a fresh step has been taken by the defendant after a knowledge of the plaintiff's absence from the country has reached him. I do not think the defendant was bound to take any step towards obtaining security for costs until he perceived that the plaintiff, by declaring, was in earnest. Here the plaintiff sued out his writ in the month of *June*, and never declared until the month of *October*. I think, therefore, the defendant is entitled to have his rule made absolute.

Rule absolute (a).

(a) See *Brown v. Wright*, ante, Vol. 1, p. 95.

WIGLEY v. TOMLINS.

MILLER shewed cause against a rule *nisi* obtained by *R. Alexander*, for setting aside a judgment, on the ground

The 2 & 3 W.
 4, c. 39, s. 11,
 abolished im-
 parlances.

1834.

WIGLEY
v.
TOMLINS.

of irregularity. The alleged irregularity was, that the judgment had been signed too soon. It appeared, that the writ had been served on the 4th *August*, and the defendant duly appeared. On the 24th *October* the defendant delivered his declaration indorsed to plead in four days. The defendant not pleading, judgment was signed on the 29th. The rule *nisi* was obtained to set the judgment aside, on the ground that the defendant was entitled to an imparlance until *Michaelmas* Term, and that therefore the judgment was signed too soon. It was contended, however, that the defendant could not be entitled to an imparlance, as by the 2 Will. 4, c. 39, s. 11, it was provided, "that, if any writ of summons, *capias*, or detainer, issued by authority of this act, shall be served or executed on any day, whether in term or vacation, all necessary proceedings to judgment and execution may, except as hereinafter provided, be had thereon, without delay, at the expiration of eight days from the service or execution thereof, on whatever day the last of such eight days may happen to fall, whether in Term or vacation." The time at which the defendant would be bound to plead did not come within any of the provisoes contained in section 11 of the Uniformity of Process Act, and therefore was under the operation of the general provision. By the operation of that section, imparlances were virtually abolished, and consequently the defendant could not be entitled to an imparlance.

R. Alexander, in support of the rule.—In this case the rule *nisi* was originally obtained on the authority of the case of *Frean v. Chaplin* (a), where Mr. Justice *Taunton* held that imparlances were not yet abolished, notwithstanding the provisions contained in section 11 of 2 W. 4, c. 39. It had, however, just been decided by the Court

(a) *Ante*, Vol. 2, p. 523.

of *Exchequer*, on reviewing the judgment in that case, that imparlances were now altogether abolished, and therefore he must submit to have the rule discharged. He trusted, however, that it would be discharged without costs, the case of *Frean v. Chaplin* having been reported, and, as the Court of *Exchequer* had admitted, correctly.

1834.
WIGLEY
v.
TOMLINS.

LITLEDAL, J.—The view which it appears the Court of *Exchequer* has taken of this question is that which I myself should have been inclined to take, on reading the 11th section of the Uniformity of Process Act. The present rule must, therefore, be discharged, but without costs, a learned Judge having pronounced a decision, on the authority of which the present application was made.

Rule discharged, without costs.

DOE d. GEORGE v. ROE.

JOHN JERVIS moved for judgment against the casual ejector. The affidavit on which he made the application stated, that the deponent had gone to the premises sought to be recovered, and there saw the daughter of the tenant in possession. He inquired for the latter, but was informed that he was not at home. In returning from the premises he met the wife of the tenant in possession. He explained to her the object of his visit, and she told him to go back to the premises and she would meet him there, when he might serve her. He accordingly went back to the premises, but she was not to be found there. The daughter, however, was, and he served her with a copy of the declaration, giving at the same time the usual explanation. This was on the 30th of *October*.

Service on the daughter on the premises is insufficient, even for a rule nisi, although there may be reason to believe the wife is aware of the proceeding, and keeps out of the way to avoid being served.

1834.

WILTON v. CHAMBERS.

(Before the four Judges.)

Where the sheriff has been allowed to withdraw from possession by authority of a rule under the Interpleader Act, he cannot afterwards, and after he is out of office, be compelled to re-enter.

IN this case an application was made on behalf of the sheriff of *Dorsetshire*, about three years ago, under the Interpleader Act, in order to relieve himself from the claims on the part of the defendant's assignees on the property seized by him under a *fi. fa.* issued by the plaintiff. A rule was ultimately pronounced, authorizing the sheriff to withdraw until the question as to the validity of the commission should be decided, with *liberty* for him to re-enter after that period. The assignees were nonsuited in a cause subsequently tried, upon which the validity of the commission turned, and a rule *nisi* was then obtained on behalf of the plaintiff, requiring the sheriff and the assignees to shew cause why he should not re-enter.

F. Pollock appeared on behalf of the assignees, and contended that the Court had no power to interfere as required. The sheriff, if he chose, might apply to the Court for leave to re-enter, but no authority existed on the part of the Court to compel him to re-enter, and probably render himself a trespasser.

Barstow appeared for the sheriff, and submitted, that, as the writ originally issued had now become *functus*, the sheriff was no longer compellable to execute it. He was out of office; the bailiff, who had originally entered, was dead. He could make out no warrant; he had no official seal.

R. Alexander contended, in support of the rule, that the sheriff was originally bound to execute the writ. For his own relief, the Court had allowed him to withdraw until the question as to the bankruptcy should be decided. During that period, the writ was in abeyance; but, when

the question as to the bankruptcy was decided, the writ again came into full force, and he was bound to obey its exigency.

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LORD DENMAN, C. J.—If the sheriff thinks proper to re-enter, he may do so under the terms of the rule; but if he does not, the Court has no power to compel him to re-enter.

Rule discharged, the plaintiff paying the costs of the assignees and of the sheriff.

BARRETT v. DEARLE.

WHITE moved for a rule that the defendant should have leave to pay a sum of 5*l.* into Court by way of compensation and amends under the 3 & 4 *Will.* 4, c. 42, s. 21, and that the said sum of 5*l.* might be received into Court under a plea of tender before execution brought, and under a plea of payment into Court according to R. H. T. 4 *Will.* 4, s. 17 (a). It was an action of *assumpsit* by a landlord against his tenant. The declaration was founded on an agreement, and contained breaches for not keeping and leaving a house and premises in repair, for not painting the outer part of the house, and for not leaving the fixtures in the same plight and condition as they were in at the making of the agreement, but for leaving part of them in a worse plight, and not leaving the other part at all.

A plea of tender will not be allowed in an action for unliquidated damages.

LITLEDALE, J.—I think the right to tender in an action like the present is expressly excluded by the nature of

(a) *Ante*, Vol. 2, p. 320.

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the claim, and I cannot grant you a rule. You may mention it to the full Court if you please.

On application afterwards to the full Court, (consisting of Lord *Denman*, C. J., and *Patteson*, J.), the rule was refused.

Rule refused.

BANKS v. WRIGHT.

Where a plaintiff does not proceed to the trial of an issue before the under-sheriff, pursuant to notice, the time at which he would be compelled to proceed by the Court will be regulated by the times at which the sheriff sits.

CLARKSON shewed cause against a rule *nisi* for judgment as in case of a nonsuit obtained by *Ball*. A Judge's order for trying the cause before the under-sheriff of the county of *Westmorland* had been obtained, and notice of trial given. This notice was countermanded in consequence of a letter written by the defendant to the plaintiff's attorney, requesting that the trial might be postponed. This was the excuse given for not proceeding to trial pursuant to notice.

Ball suggested that, under the late act of Parliament which was passed to prevent delay in the trial of causes before the sheriff, the slight excuse stated in this affidavit was not sufficient.

LITLEDAL, J.—I think that is a sufficient excuse, and that the same rule applies as in other causes, and therefore the rule must be discharged, the plaintiff giving a peremptory undertaking to proceed to trial at the first sitting of the under-sheriff after the expiration of a month.

Rule discharged accordingly.

1834.

PERRING and Others v. TURNER.

MARTIN shewed cause against a rule *nisi* obtained by *Mansel* for cancelling the bail-bond, on entering a common appearance, on various grounds. The first was, that the residence of the defendant was not sufficiently described in the writ of *capias* on which he had been arrested. The description in the writ of the defendant's residence was "*Holland Street, North Brixton.*" The writ was, however, directed to the sheriff of the county of *Surrey*. This, he submitted, was sufficient. He cited *Webb v. Lawrence* (a), where it was held that the description of a defendant in the *capias*, as of "*Kent Street, in the county of Surrey,*" without the number of the house or parish where situate, was sufficient; and *Welsh v. Langford* (b), and *Buffle v. Jackson* (c), where the Court held, that great exactness need not be employed in describing the defendant's residence in a writ of *capias*, but that the plaintiff may give the best description he can of the place where the defendant is to be found. The second objection was, that the day of the month was omitted in the *teste* in the copy of the writ, although the original was correct. The name of the month itself was, however mentioned. This, he feared, was fatal to the proceeding.

If the defendant's residence is sufficiently described in a *capias*, with the exception of the county, that defect is supplied by the direction to the sheriff.

The omission of the day of the month in the *teste* of the copy of the writ, though the month itself is named, is fatal.

Where a bail-bond is cancelled, the plaintiff is not bound to accept an appearance by the defendant, though the entry of it was mentioned as a condition in the rule *nisi*.

LITTLEDALE, J.—I think the first objection is cured by the writ being directed to the Sheriff of *Surrey*. The omission of the date in the copy served is fatal, and the bail-bond must be delivered up to be cancelled.

Mansel said, that would, of course, be on the defendant's entering a common appearance.

(a) *Ante*, Vol. 2, p. 81.

(b) *Ante*, Vol. 2, p. 498.

(c) *Ante*, Vol. 2, p. 505.

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Martin refused to have an appearance entered by the defendant, his client having a right to decline it. Entering an appearance was a benefit to the plaintiff which the defendant proposed, and which the Court required as a condition of cancelling the bail-bond, or discharging the defendant out of custody; but that benefit the plaintiff had a right to refuse; there might be various reasons why the plaintiff would be desirous of submitting to have the bail-bond cancelled or the defendant discharged, and discontinuing his action in order to bring another.

Mansel, contra, submitted that the defendant had a right to enter an appearance after the step taken by the plaintiff, by arrest, in order that the action might proceed. It could be of no benefit to the plaintiff to discontinue this action, as he could not of his own authority arrest the defendant a second time. He must proceed by serviceable process; and, that being so, it was for the benefit of the plaintiff that the proceedings should be so far advanced that the defendant had appeared.

LITTLEDALE, J.—It is true that the entering an appearance by the defendant is a benefit to the plaintiff, but it is one which he is not bound to accept. If he chooses to decline it, I cannot compel him to take it. In general, the plaintiff does accept it, and I never heard of an instance before this of such a refusal. You may therefore apply to the full Court upon the point.

An application was afterwards made to the four judges in the other Court, and they also were of opinion that entering an appearance was solely for the benefit of the plaintiff, and therefore that he had a right to refuse it.

Rule absolute accordingly.

1834.

URQUHART v. DICK.

MARTIN shewed cause against a rule obtained by *Steer* for setting aside a writ of *capias* and all proceedings thereon, with costs, on the ground of certain defects in the affidavit of debt and the writ. The first objection was, that the affidavit was not intituled in any Court; and, secondly, that the jurat stated it to be sworn at *Edinburgh*, without shewing in what country that city was; thirdly, that a description of the defendant's residence was omitted in the writ; and, fourthly, that the indorsement of the debt and costs demanded by the plaintiff was incorrect according to the directions contained in 2 *Reg. Gen. H. T. 2 Will. 4*, the word "arrest" being introduced instead of the word "service (a)."

In the indorsement pursuant to 2 *Reg. Gen. H. 2 Will. 4*, if "execution" is substituted for "service," it is an irregularity, but which may be amended on terms.

An affidavit of debt sworn before a commissioner need not be intituled in any Court.

LITLEDALE, J.—That last objection may be obviated by the plaintiff amending. In the rule itself, nothing is said either about "service" or "execution"; but, in the form attached to the rule, the words are, "and, if the amount thereof be paid to the plaintiff or his attorney within four days from the service hereof, further proceedings will be stayed." Where the process was bailable, in many instances the word "execution" was substituted for "service;" and the judges, in many cases, directed either the defendant to be discharged out of custody, or the bail-bond to be delivered up to be cancelled, on the ground of that variation from the rule. This, however, was considered by others of the judges as too severe, and therefore, after a conference by all of them, a middle course was adopted, with the concurrence of all except one of the Judges. This course was, to allow the plaintiff to amend the indorsement on payment of costs, and stay-

(a) *Ante*, Vol. 1, p. 198.

1834.

PHILLIPS, Assignee &c., v. HUTCHINSON and Others.

"Phillips, assignee &c.," is an irregular mode of describing a plaintiff in intituling an affidavit.

KELLY and Ball shewed cause against a rule *nisi*, obtained by *Mansel*, requiring the plaintiff to shew cause why the judgment signed on the bail-bond as for want of a plea should not be set aside with costs, to be taxed by the Master, and to be paid by the plaintiff or his attorney, with a stay of proceedings. As a preliminary objection, they contended that the affidavit on which the rule had been obtained was improperly intituled, as the plaintiff was described as *Phillips, assignee &c.*" They cited *Steyner v. Cottrell* (a), where the Court of *Common Pleas* held, that an affidavit, the title of which styled the plaintiff "assignee," without further explanation, was bad; and *Wright, assignee of Johnson, v. Hunt* (b), where it was held, that affidavits intituled in a cause, without giving the plaintiff the addition of "assignee," cannot be used in a cause where the plaintiff sues as assignee. By merely introducing the word "assignee," it did not at all appear of what species of assignee the plaintiff was; for any thing shewn by the intituling of the affidavit, the plaintiff might be the assignee of a bankrupt, of an insolvent, or of the sheriff. The principle on which questions of this sort were tried was, whether a person making an affidavit so intituled could be indicted for perjury. If it were alleged in such an indictment that the oath had been taken in a cause of "*Phillips, assignee &c., v. Hutchinson and Others*," it would in fact be alleging the oath to have been taken in no cause at all.

Tomlinson and Mansel, contra.—The objection on the other side was, that perjury could not be assigned on this affidavit, from the description given of the plaintiff. It

(a) 3 Taunt. 377.

(b) *Ante*, Vol. 1, p. 457.

was submitted, however, that such an indictment might be maintained, for the cause was substantially between the plaintiff *Phillips* and the defendants, and the words "assignee &c." were mere surplusage; for the assignment conveyed to the plaintiff all the rights of the sheriff. But supposing the Court should be of opinion that the affidavit was improperly intituled, it would at least allow the plaintiff to amend. In *Price v. James (a)*, the Court allowed a much more important amendment than that now sought to be made. There the christian and surname of the defendant were transposed in an order of reference, and the Court allowed the mistake to be amended. The effects of the amendment, in that case, were much more important than those which could result from the one which the plaintiff here proposed to make. There the authority exercised by the arbitrator was an authority in another cause, and yet the rule of law was, that such authority must be strictly pursued. His whole authority was derived from the order of reference, and yet the Court, by its amendment, made it appear that the authority had been exercised in another cause. Another effect of that amendment would be, to prevent the witnesses sworn before the arbitrator from being indicted for perjury, they having been sworn in another cause. Surely this was a much stronger case of amendment than the present. In all the cases which had been cited, in order to shew that the affidavit was improperly intituled, it did not appear by the reports that any application had been made to amend the affidavits. So far, therefore, as concerned the question of amendment, they were no authorities.

LITTLEDALE, J.—I think it ought to appear what kind of an assignee the plaintiff is, in order that it may be seen

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(a) *Ante*, Vol. 2, p. 435.

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whether he is an assignee of a person to whom by law he may be an assignee.

Cur. adv. vult.

LITLEDALE, J.—The affidavit itself is wrongly intituled. Then with respect to the question of amendment, it appears to me that the title cannot be amended. How can you have an affidavit dated one day in support of a rule several days old, and which is supposed to have been granted on that affidavit? Great inconsistency would then appear. Then it is said that the rule may be enlarged. There also the same objection will arise, because then it must be the original rule which is discharged or made absolute. As, however, the objection thus taken is purely technical, the present rule must be discharged without costs.

Rule discharged without costs.

DOE d. GEORGE v. ROE.

Judgment against the casual ejector may, under special circumstances, be obtained on an affidavit swearing the service to have been on the tenant in possession, "as the deponent believes."

MOODY applied for judgment against the casual ejector. The peculiarity in the case was, that the deponent did not swear, and could not swear positively, who was the tenant in possession of the premises. His affidavit was, "he believes." The premises were used as a gambling-house, and from the nature of such an employment, it was impossible to obtain access to the persons on the premises, so as to swear positively who was the tenant in possession. There was a species of grating in the outer door, and as soon as any person having the appearance of an attorney, or having anything like a paper in his hand, came within view of the grating, the inner door was immediately closed. Various efforts had been made, but without effect, to discover who was the tenant in possession; and, therefore, all that the party endeavouring to serve

the declaration could swear was, that the service had been on the person he "believed" to be the tenant in possession.

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d.
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LITLEDALE, J.—The rules of the Court require that the service should be on the tenant in possession, and with them I cannot dispense so as to admit an affidavit in this form to be sufficient. You may, if you choose, apply to the other Court.

Moody afterwards renewed his motion before the full Court.

Per Curiam.—Under the special circumstances of the case, we think the strict rule, as to swearing the service to have been on the tenant in possession, may be dispensed with. You may take a rule *nisi* to be served on the persons at the door, or by sticking it on the premises.

Rule *nisi* accordingly.

COLLS and Others v. MORPETH.

DOWLING moved for a rule to shew cause why the bail-bond in this case should not be delivered up to be cancelled, on the ground that the indorsement on the back of the writ with respect to the amount of debt and costs was incorrect. In the form attached to 2 *Reg. Gen. H. T. 2 Will. 4, (a)*, it was stated, that, if the amount claimed together with costs were paid within four days from "the service" of the process, proceedings would be stayed. As the word "service" was so introduced, that could only apply to cases where the process was serviceable. Where, however, the process was bailable, the word "execution"

In the indorsement, pursuant to 2 *Reg. Gen. H. T. 2 W. 4*, the word "service" and not "execution" must be used, although the defendant has been arrested.

(a) *Ante*, vol. i., p. 198.

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ought to be used. That this distinction between service and execution of the *capias* was recognised, appeared from the fact, that, by s. 4 of the Uniformity of Process Act, (a), if there were several defendants one might be arrested while the others might be served. In the fourth warning attached to the writ, also the distinction was recognised. The words of it were, "if a defendant having been served only with this writ, and not arrested thereon, shall not enter a common appearance within eight days after such service, the plaintiff may enter a common appearance for such defendant, and proceed thereon to judgment and execution." Here the indorsement was "service." and not execution," although the defendant had been arrested. But it would appear from the indorsement that he had only been served.

Cur. adv. vult.

LITLEDALE, J.—I have referred to the Judges on this point, and they are of opinion, that, as the form attached to the rule is pursued, the indorsement is correct. In several instances, plaintiffs introduced the word "execution" where the defendant was arrested, instead of the word "service;" and applications were made to discharge defendants or cancel bail-bonds, on the ground of such variance from the form attached to the rule. In many cases defendants were discharged, and bail-bonds delivered up to be cancelled. That was, however, thought too severe upon plaintiffs, and therefore it was agreed that the plaintiff should be allowed to amend on payment of costs, proceedings being stayed for four days from the time of the amendment, in order to give the defendant an opportunity to pay the debt and costs. Here, however, the form has been exactly pursued, and therefore no objection exists to the writ.

Rule refused (b).

(a) See 3 Dowl. Stat., p. 148.

(b) See *Urquhart v. Dick*, ante, p. 17.

1834.

STRUTTON and Another v. HAWKES.

MANSEL moved to make a rule to compute absolute. There was some peculiarity in the mode of serving the rule *nisi*. The deponent, on whose affidavit he moved, stated that he had gone to the chambers of the defendant, who was an attorney, and pushed the rule under the door; he afterwards saw the laundress, who told him that the defendant would have the rule the same day. At the time the rule was pushed under the door the chambers were closed. He cited *Engleheart v. Morgan* (a). There, on a similar application, it appeared that the party endeavouring to serve the rule, on going to the defendant's residence, had found a board stuck up, on which were the words "messages and parcels to be left at" a particular place mentioned. The deponent went there, and saw a woman, who informed him she was in the habit of receiving messages and parcels for the defendant. He left the rule with her, and she afterwards said she had given it to the defendant. The affidavit went on to state, that the defendant had left his residence six weeks previously, as the deponent believed. In *Warren v. Smith* (b), the service of the rule was by leaving it with the defendant's mother at his residence. In *Payett v. Hill* (c), the service of the rule at the defendant's house where his family were residing, although he had himself gone away, was held sufficient, even without leave of the Court.

Service of a rule *nisi* to compute, by putting it under the door of the defendant's chambers, is not sufficient, although the laundress states that the defendant will probably have the rule in the course of the day.

LITLEDALE, J.—All those cases appear to have been correctly decided, but none of them are exactly similar to this in circumstances. Putting the rule under the door is not of itself sufficient. It does not appear here that the deponent might not have gone to the chambers another time and found them open.

Rule refused.

(a) *Ante*, Vol. 1, p. 422.

(b) *Ante*, Vol. 2, p. 216.

(c) *Ante*, Vol. 2, p. 688.

1834.

DANIELS v. VARITY.

The sheriff's return to a *distringas* of *non est inventus* and *nulla bona*, is not alone sufficient to entitle the plaintiff to enter an appearance for the defendant; and the Court cannot listen to hearsay evidence of the efforts made to execute the writ.

RAINS moved for leave to enter an appearance for the defendant under the 2 & 3 Will. 4, c. 39, s. 3 (a), a *distringas* having issued, and the sheriff having returned *non est inventus* and *nulla bona*. It appeared, however, that the officer of the sheriff, who had endeavoured to execute the *distringas*, was deceased. He had, however, previous to his death, stated the efforts he had made for the purpose of executing it to another person; that person had made an affidavit stating those efforts.

LITLEDAL, J.—Those facts may be perfectly true; but I cannot act on the hearsay evidence of what was done by a particular person. The return of the sheriff is not sufficient without my being also satisfied of the propriety of allowing the plaintiff to enter an appearance for the defendant, by seeing what efforts have been made to execute the *distringas*. You must come with better materials before you can be allowed to enter an appearance for the defendant.

Rule refused.

(a) See 3 Dowl. Stat. p. 145.

CLARKE v. QUINCE.

The Court will grant a rule to compute principal and interest on a promissory note, although it is clearly shewn that the note has been destroyed.

MANSEL moved for a rule *nisi* to compute principal and interest on a promissory note. It appeared that the promissory note had been destroyed. It was positively sworn by one deponent that he had seen the defendant tear the promissory note to pieces. He cited *Allen v. Miller* (a), where a bill of exchange, on which the action

(a) *Ante*, Vol. 1, p. 420.

was commenced, had been stolen out of the plaintiff's attorney's office; and *Brown and Others v. Messiter (a)*, where the bill had been stolen out of the attorney's pocket.

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LITTLEDALE, J.—You may take your rule.

Rule *nisi* granted.

(a) 3 M. & Sel. 281.

FISHER v. SNOW.

PLATT moved for judgment in favour of the plaintiff on a demurrer to a declaration.

Archbold appeared to support the demurrer.

Platt objected to his being heard in support of the demurrer until his client had paid or deposited a sufficient sum to pay for the copies of the demurrer book delivered by the plaintiff to the two junior Judges of the Court, pursuant to 7 *Reg. Gen. H. T.* 4 *Will.* 4 (a). The words of that rule were, “four clear days before the day appointed for argument, the plaintiff shall deliver copies of the demurrer book, special case, or special verdict, to the Lord Chief Justice of the *King's Bench* or *Common Pleas*, or Lord Chief Baron, as the case may be, and the junior Judge of the Court in which the action is brought; and the defendant shall deliver copies to the other two judges of the Court next in seniority; and in default thereof by either party, the other may, on the day following, deliver such copies as ought to have been so delivered by the party making default: and the party making default shall not be heard until he shall have paid for such copies, or deposited with the clerk of the rules in the *King's Bench*

If a party seeks to make his opponent pay the costs of copies of demurrer books, pursuant to 7 *R. G. H.* 4 *W.* 4, he must deliver them on the day after the time for his opponent's delivering them expires. It is no ground of demurrer to a declaration in an action by an attorney that he seeks to recover for “materials” supplied by him to his client.

The improper introduction of a venue in a declaration, contrary to 8 *Reg. Gen. H. T.* 4 *Will.* 4, is not a ground of demurrer, but of application to a Judge to strike it out.

(a) *Ante*, Vol. 2, p. 305.

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and *Exchequer*, or the secondary in the *Common Pleas*, as the case may be, a sufficient sum to pay for such copies." Here the argument was to come on on *Tuesday*, and therefore the defendant ought to have delivered his copies on *Thursday*, in order that four clear days might elapse between the delivery and the argument. The plaintiff searched at the Judge's chambers on *Friday*, and found that no copies had been delivered. On *Saturday* morning he delivered them himself. Before the defendant therefore could be heard, he must either pay or deposit a sufficient sum for those copies.

Archbold, contra, contended, that as, according to practice, a delivery of the demurrer books on *Saturday* would be in time for *Tuesday*, the defendant had the whole of *Saturday* to deliver them in. The plaintiff, therefore, was premature in delivering his copies, and could not consequently compel the defendant either to pay or make a deposit for them previous to his being heard.

LITTLEDALE, J.—I think, under the circumstances, the plaintiff is not entitled to the costs of these copies before the defendant is heard. The rule says, that, "in default thereof by either party, the other may, on the day *following*, deliver such copies." Now, although a delivery on the day next but one may be sufficient to enable the plaintiff to proceed with the argument; yet, as the plaintiff seeks to make the defendant pay costs, he ought to have delivered the extra copies on the day following that on which the delivery ought to have been made by the opposite party.

The argument was then deferred until a subsequent day, when it came on before Mr. Justice *Williams*.

Archbold was then heard in support of the demurrer.

There were two grounds of demurrer; the first was, that the plaintiff, who was an attorney, could not charge as he had done in his declaration for the materials supplied by him in carrying on the suit at the instance of the defendant. The second ground was, that the plaintiff had improperly introduced a venue in the count on the account stated. The words of that count were, "on an account then and there stated between them." This was an infraction of 8 *Reg. Gen. H. T.* 4 *Will.* 4 (a), the words of which were, "the name of a county shall in all cases be stated in the margin of a declaration, and shall be taken to be the venue intended by the plaintiff, and no venue shall be stated in the body of the declaration, or in any subsequent pleading." Here a venue was stated, and that being an infraction of a rule of pleading, which, by the 3 & 4 *Will.* 4, c. 42, s. 1, had the force of an act of Parliament, was clearly a ground of demurrer.

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Platt, contrà, contended that the improper introduction of the venue was not a ground of demurrer, but of application to a Judge at chambers to have it struck out. He cited *Harper v. Chumneys* (b), where the Court of *Exchequer* had decided such improper introduction to be no ground of demurrer, but merely an application to a Judge at chambers to strike it out. In a case of *Neill v. Davis*, mentioned in a note to the same case, a similar decision had been pronounced by the same Court.

WILLIAMS, J.—With respect to the first ground of demurrer, it appears to me that it cannot be sustained. The allegation is generally "materials." The Court cannot say that an attorney in no case will be entitled to recover for materials; for, if it were, then it would be of no consequence what materials, whether parchment or vellum,

(a) *Ante*, Vol. 2, p. 318.(b) *Ante*, Vol. 2, p. 680.

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or any thing more precious the client might think proper, were used in the conduct of his cause, the attorney would not be entitled to recover for them. It cannot for a moment be held, that, under such circumstances, the attorney would not be entitled to recover. The judgment of the Court, therefore, must be for the plaintiff on that point. With respect to the second ground of demurrer. I cannot hold that the improper introduction of a venue is a ground of demurrer after the decision of the Court of *Exchequer* that it is not. According to the case of *Harper v. Chumneys*, the proper course would have been to have applied to a Judge at chambers to strike out the venue thus improperly introduced. On that ground, also, the judgment of the Court must be for the plaintiff.

TURNER v. GILL.

Where a party is allowed to amend on condition of paying costs; but he amends and proceeds without such payment, he is still not liable to an attachment.

KELLY moved for a rule to shew cause why an attachment should not issue against the plaintiff for nonpayment of costs. The facts were these:—The plaintiff had improperly indorsed his writ of *capias*, in stating the amount of debt and costs claimed by the plaintiff pursuant to 2 *Reg. Gen. H. T. 2 Will. 4 (a)*, by introducing the word “execution” instead of the word “service.” He then applied to a Judge at chambers to be allowed to amend. This being permitted on payment of costs, an order was made by the learned Judge in these words: “Upon hearing the plaintiff’s attorney and the defendant’s attorney, I order that, upon payment of costs, the plaintiff shall be at liberty to amend the indorsement on his writ, and that further proceedings shall be stayed until those

(a) *Ante*, Vol. 1, p. 198.

costs be paid." The plaintiff, however, did not pay those costs, although he had amended, and was still proceeding with his action. The question was, whether the nonpayment of costs under those circumstances was a ground for an attachment.

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LITTLEDALE, J.—I do not see how I can interfere in this matter, the order may be rescinded on application for that purpose, and then the plaintiff's proceedings will be irregular; but this order being conditional, I do not see how I can direct an attachment for non-performance of it. In the case of *Rese v. Fenn* (b), a similar application was made, where an order had been made for striking out a plea on payment of costs to the plaintiff, and there my brother Taunton held that an attachment could not issue although the plea had been struck out, and the costs had not been paid. I agree with my brother Taunton's opinion.

Kelly sought to distinguish the case cited from the present, by referring to the words of the order—"that further proceedings shall be stayed until those costs be paid."

Rule refused.

LITTLEDALE, J.—I think that makes no difference.

MANNING v. BROWN.

PLATT moved that the Master's report in this case should be read.

It was in the following terms:—"On the 31st May, 1833, an order was made by Mr. Justice Taunton, as fol-

After the lapse of nine years, the Court will not compel an attorney to re-deliver bills for business done

by him, without some suggestion of fraud, mistake or overcharge.

(b) *Ante*, Vol. 2, p. 182.

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lows:—" *Manning v. Brown*. Upon hearing the attornies or agents on both sides, I order that Mr. *Edward Savage* shall, within fourteen days, deliver to Mr. *William Pullen*, the defendant's attorney, a signed bill of his fees, costs, charges, and disbursements in this and other causes and matters wherein he has been concerned for the said defendant, and that he give credit for all sums of money by him received from or on account of the said defendant." In obedience to this order Mr. *Savage* delivered certain bills of costs, together with a cash account, in respect of all transactions between himself and his client from the year 1823 down to 1833, when his employment ceased. The above order was then made a rule of Court by Mr. *Pullen*, the new attorney, and bills of costs, &c., in respect of business done by *Savage* for *Brown* prior to 1823, were demanded from *Savage*. Such bills, &c. having been refused by *Savage*, on the ground of their having been settled, a rule *nisi* for an attachment was obtained against him, and on his shewing cause in *Easter* Term, 1834, the Court ordered "That the matters of the rule should be referred to the Master to report thereon, with liberty to call for further affidavits." It appears by the affidavit that *Savage* was employed by *Brown* from 1815 to 1833, and that in the course of such employment *Savage* had received and paid on *Brown's* account considerable sums of money. And with regard to the bills now called for by *Pullen*, namely, those for business done between 1815 and 1823, it is alleged by *Savage* not only that those bills were regularly made out and delivered at the time; but it is also distinctly sworn by *Savage*, and an accountant employed by him on the occasion, that, on the 19th *December*, 1823, a regular account of all transactions between him and his client (in which the total amount of those bills was charged in one item) was made out, and submitted to the client, who, in the presence of the accountant, went over the same and compared the vouchers therewith, and by

which a balance of 377*l.* 8*s.* 7*d.* was found due to *Savage*; and that the following memorandum was thereupon signed by *Brown* and *Savage* at the foot of such account. '1823, December 19. This account signed, settled, and allowed to be correct, and Mr. *Brown* is to give security for the same.' Signed 'Henry *Brown*, Edward *Savage*.' At the same time, two copies of the account were made, one of which was delivered to *Brown*, and the other retained by *Savage*. In November, 1824, *Brown* executed a warrant of attorney to *Savage* for 300*l.* and interest. In March, 1833, *Brown* assigned all his property to one *Jones*, in trust for the benefit of his creditors; and *Pullen* as solicitor for the estate, and perhaps for *Brown* also, is now desirous of opening the whole matter, alleging, but as a matter of *belief* only, that, if the previous bills and cash account were investigated, a very considerable balance would be found to be due from *Savage* thereon. Neither fraud, nor overcharge, nor misconduct, is alleged. On the contrary, the only substantial ground relied upon by *Brown* and *Pullen* is, that, as the warrant of attorney was given for 300*l.* only, instead of the 377*l.* 8*s.* 7*d.* found due to *Savage* by the account settled in December, 1823, such 300*l.* must be considered as a payment on account of the whole employment, and not as a settlement of part. It does not appear either by the warrant of attorney, the defeasance, or the affidavits, how the 77*l.* 8*s.* 7*d.*, the residue of the original balance, was arranged; but *Savage* expressly swears that the warrant of attorney was given for securing the sum of 300*l.* of that balance with interest; and he makes no charge in respect of such 77*l.* 8*s.* 7*d.*, being of opinion, that it might possibly have been settled in account with *Brown* in some way during the interval that elapsed between the settlement of the account in December, 1823, and the date of the warrant of attorney, a period of eleven months. This course cannot be complained of by the other side, for it is not suggested by *Brown* that he ever paid it. It has been decided in *seve-*

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ral cases in this Court that a bill cannot be taxed after settlement and payment, unless it can be impeached on the ground of gross fraud, overcharge, or mistake. And in a case in the *Common Pleas*, where a bond had been given for the amount of a bill five years before the application, the Court refused to refer the bill, saying an attorney at that rate could never be safe.

"I humbly submit, therefore, that as Mr. *Savage's* bills, in respect of which the warrant of attorney was given nine years ago, have not been impeached on any of the above grounds, he is not now bound to re-deliver them, and consequently that the rule for the attachment for their non-delivery should be discharged with costs.

"*R. Goodrich, Nov. 1834.*"

Platt then moved that the report be confirmed.

No one appeared to oppose that motion.

WILLIAMS, J.—The report must be confirmed; and the rule for an attachment will, therefore, be discharged with costs.

Rule discharged, with costs.

SMART, Assignee of the Sheriff of *Middlesex*, v. LOVICK and Others.

In an action on a bail-bond, it is unnecessary to make the indorsement of debt and costs claimed pursuant to 2 *Reg. Gen. H. T. 2 Will. 4*, and 5 *Reg. Gen. M. T. 3 Will. 4*.

PLATT shewed cause against a rule *nisi* for setting aside the process in this case, on the ground that the amount of debt and costs claimed by the plaintiff had not been indorsed upon the process pursuant to 2 *Reg. Gen. H. T. 2 Will. 4 (a)*, extended by 5 *Reg. Gen. M. T. 3 Will. 4 (b)* to all writs issued under the authority of the Uniformity of Process Act. It was an action on a bail-bond, and the indorsement in question as to the amount of debt and costs claimed by the plaintiff had been

(a) *Ante*, Vol. 1, p. 198.

(b) *Ante*, Vol. 1, p. 471.

omitted. But he contended that the rule in question did not apply to the case of an action on a bail-bond. He cited *Rowland v. Dakeyne and Others* (a), where the Court held, that, in an action on a bail-bond or a replevin bond, it is not necessary to indorse the amount of debt and costs pursuant to the rules referred to. That was a case in the *Common Pleas* before the full Court, and it appeared by the report that a majority of the Judges held the indorsement to have been properly omitted.

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LITLEDAL, J.—It appears to me that that was a correct decision, for I think that the case of an action on a bail-bond does not come at all within the intention of the rules in question.

Rule discharged, without costs.

(a) *Ante*, Vol. 2, p. 832.

DOE d. GRIMES v. PATTISSON.

GUNNING applied under the 13 *Geo.* 3, c. 63, s. 45, and 1 Will. 4, c. 22, s. 1, for a *mandamus* to examine witnesses in *India*, in a cause in which a question would arise as to the validity of a will. The cause of action arose in *England*. The only doubt was, whether the rule should be absolute or *nisi* in the first instance.

A rule for a *mandamus* to examine witnesses in *India* under the 13 *Geo.* 3, c. 63, s. 45, is *nisi* in the first instance.

LITLEDAL, J., (after consulting with the clerk of the rules, Mr. *Aulesbrook*,) directed that the rule should be *nisi*.

Rule *nisi* granted.

The rule was afterwards made absolute (a).

(a) On shewing cause against this rule the objection was not pressed that the Court had no jurisdiction to direct such a *manda-*

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mus, the cause of action arising in this country. The words of the act of the 13 Geo. 3, c. 63, s. 45, are, "when and as often as the *East India Company*, or any person or persons, shall commence and prosecute any action or suit in law or equity, *for which cause hath arisen in India*, against any other person or persons in any of his Majesty's Courts at *Westminster*, it shall and may be lawful for such Courts respectively, upon motion there to be made, to provide and award such writ or writs in the nature of a *mandamus* or commission, as therein mentioned, for the examination of witnesses." It will be seen from this, that if the cause of action arose out of *India*, the Court would have no power to grant a *mandamus*. Then the question is, whether the 1 *Will.* 4, c. 22, s. 1, gives any further power to the Court in such a case. That section begins by reciting that certain powers "for the examination of witnesses in *India*, in the cases therein mentioned, are given by the 13 G. 3, c. 63;" and then proceeds to enact, "that all and every the powers, authorities, provisions, and matters contained in the said recited act relating to the examination of witnesses in *India*, shall be and the same are hereby extended to all colonies, islands, plantations, and places

under the dominion of his Majesty in foreign parts, and to the judges of the several Courts therein, and to all actions depending in any of his Majesty's Courts of law at *Westminster*, in what place or country soever the cause of action may have arisen, and whether the same may have arisen within the jurisdiction of the Court, to the judges whereof the writ or commission may be directed, or elsewhere, when it shall appear that the examination of witnesses, under a writ or commission issued in pursuance of the authority hereby given, will be necessary or conducive to the due administration of justice in the matter wherein such writ shall be applied for." It must be clear from examining these provisions, that no additional power was given to the Courts, so far as *India* was concerned, although the provisions of the *Indian* act were extended by it to his Majesty's other foreign dominions. As far as *India* was concerned, the Courts were still bound by the provisions contained in the 13 Geo. 3, c. 63, s. 45. As those provisions gave no authority to the Courts to issue writs of *mandamus* for the examination of witnesses, where the cause of action did not arise in *India*, they have no power for that purpose now.

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JELKS v. FRY.

HUMFREY moved for a rule to shew cause why the summons in this case should not be set aside on the ground of its describing the defendant as resident in the county of *York*, whereas he really resided at *Kingston-upon-Hull*. That he submitted was not a correct description of the defendant's residence, the town of *Kingston-upon-Hull* being a county of itself.

"*Yorkshire*" is a good description of a defendant's residence, although he resides at the town of *Kingston-upon-Hull*, if he may be supposed to be resident in the former county.

LITLEDALE, J.—In common parlance I think that is sufficient, although, strictly speaking, as *Kingston-upon-Hull* is a county of itself, it may be said that a person residing there is not resident in the county of *York*. But you may take a rule *nisi*, if, after the intimation I have given, you think it right to do so.

"*Gray's Inn, London*," is a good description of an attorney's residence under the provisions of 2 Will. 4, c. 39, s. 12.

Humfrey then objected to a defect in describing the attorney's residence in the indorsement on the writ pursuant to the provisions contained in s. 12 of the 2 Will. 4, c. 39; the words of that section were, that the writ "shall be indorsed with the name and place of abode of the attorney actually suing out the same." Here, however, the attorney was described as of "*Gray's Inn, London*," although *Gray's Inn* is not in *London*.

LITLEDALE, J.—I think that is a sufficient description of the attorney's place of abode.

Rule refused on the latter ground, and granted on the former (a).

Archbold shewed cause against the rule. He produced an affidavit in which it was sworn that the defendant re-

(a) See *Engleheart v. Eyre and Another*, ante, Vol. 2, p. 145.

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sided at a house within twenty yards of the boundary line of the county of *York*, in a street which, though having a different name from that in which the defendant lived, was a continuation of it. The description of the defendant's residence here given was sufficient according to the provisions of the 2 *Will.* 4, c. 39, s. 1; the words of that section being, "in every such writ and copy thereof, the place and county of the residence or supposed residence of the party defendant, or wherein the defendant shall be or shall be supposed to be, shall be mentioned." It might well be "supposed" here that the defendant resided in the county of *York*.

Humfrey, contra, submitted, that when a defendant resided in a street in one county, he could not be "supposed" to be resident in another.

LITLEDAL, J.—I think, as the act says "supposed to be," the description is sufficient. The present rule must be discharged with costs.

Rule discharged with costs.

Ex parte JAMES BEST.

If an application to inspect the Court rolls of a manor is made when no cause is pending, the rule is *nisi* in the first instance.

THEOBALD applied for a *mandamus* to be issued, without a rule *nisi*, to the lord of the manor of *Hallon*, in the county of *Worcester*, and his steward, to allow *James Best* to inspect the Court rolls, and take copies thereof, so far as they related to two copyhold tenements called *Turner's* and *Bodenham's* parcels of the said manor. By a recent rule of Court, 1 *Reg. Gen. H.* 2 *Will.* 4, s. 102 (a), it is ordered that "An order upon the lord of a manor to

(a) *Ante*, Vol. 1, p. 197.

allow the usual limited inspection of the Court rolls, on the application of a copyhold tenant, may be absolute in the first instance, upon an affidavit that the copyhold tenant has applied for and been refused inspection."

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Mandamus granted.

ON the following day *Theobald* stated, that, on making application for the *mandamus*, the officer had refused to issue the same, and would only grant a rule *nisi*.

LITLEDALE, J.—We can say nothing about it without seeing the officer.

Mr. *Robinson* (one of the clerks of the *Crown Office*) afterwards stated, that he understood the above rule applied only to cases in which an action was pending, and not to an *ex parte* application.

Theobald observed, that the rule contained no such limitation, but was general.

LITLEDALE, J.—The officer has adopted the correct construction.

Rule *nisi* accordingly.

Ex parte TOWNLEY.

HUMFREY moved for a rule to shew cause why an attorney of this Court should not be struck off the roll

Where an attorney is in contempt by disobeying a rule of Court, the pro-

per course of proceeding against him is by moving for an attachment, and not by applying to strike him off the roll.

A party cannot have a rule absolute, in the first instance, for an attachment for not paying costs, pursuant to a rule of Court, where those costs form part of a rule, for disobedience to which a rule *nisi* only for an attachment can be granted.

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for not assigning his articted clerk, pursuant to an order of Mr. Justice *Williams*. The applicant on the present occasion had been articted to the attorney; and, in consequence of various ill treatment to which he had been subjected, an application had been made to Mr. Justice *Williams* at chambers, in order that the attorney might be compelled to assign his clerk. His lordship, after hearing the case, made an order that the attorney should assign within a certain period, and also pay the costs of the application. That order was afterwards made a rule of Court, but the attorney had neither assigned nor paid the costs. The present application was, that the attorney for that disobedience should be struck off the roll. The reason why the application was not made for an attachment against him was, that such a proceeding would be useless, as the attorney would set it at defiance, and the applicant would still continue to lose his time, as he was, in fact, now serving no one.

LITTLEDALE, J.—Where an attorney has disobeyed a rule of Court, he is in contempt, and the proper course then is to apply for an attachment against him. If he continue in contempt, the question will then arise as to the propriety of his continuing any longer on the roll; but we cannot at once, merely for a contempt, compel him to shew cause why he should not be struck off the roll.

Humfrey then suggested that, as Mr. Justice *Williams's* order directed the payment of costs by the attorney, and that order had since been made a rule of Court, but which had not been obeyed, he was entitled to an attachment absolute in the first instance for such non-payment.

LITTLEDALE, J.—Assigning the clerk and paying the costs are both matters contained in the one order, arising out of one transaction. You cannot split the two demands,

and obtain a rule *nisi* upon one and a rule absolute on the other. You may have a rule to shew cause why an attachment should not issue against the attorney for not assigning his clerk, and not paying the costs of the application pursuant to Mr. Justice *Williams's* order.

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Rule *nisi* accordingly.

Ex parte KING.

(Before the four Judges.)

HINDMARCH obtained a rule *nisi*, directed to Messrs. *Elgie* and to Messrs. *Higgins*, attornies, at *Worcester*, calling upon them to shew cause why their respective bills of costs against *William King* should not be referred to the Master for taxation. Both Messrs. *Elgie* and Messrs. *Higgins* had been employed as *King's* solicitors; and upon some deeds being handed over by Messrs. *Elgie* to Messrs. *Higgins*, the latter had given the former an undertaking to pay them the amount of their bill of costs. Messrs. *Bedford & Pidcock*, whom *King* had afterwards employed, had given an undertaking to Messrs. *Higgins* to pay them, as well the amount of their own bill of costs, as of that of Messrs. *Elgie*, which they had made themselves liable to pay. Upon this latter undertaking, Messrs. *Bedford & Pidcock* were compelled to pay the amounts of those two bills to Messrs. *Higgins*. There were charges in each bill for preparing a warrant of attorney to confess judgment, attending execution, &c., but no other taxable item.

In an application to tax an attorney's bill, the Court will take judicial notice of his being on the roll.

In such an application, however, it must be sworn that there are taxable items in the bill, although the bill itself is exhibited.

W. H. Watson shewed cause against the rule, and took two preliminary objections. *First*, that it did not appear by the affidavits that Messrs. *Elgie* and Messrs. *Higgins*

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were attornies of this Court; and this Court could not know that they were attornies, which was necessary in order to give the Court jurisdiction. *Secondly*, that the affidavits did not state that there was a taxable item for business done in this Court in either of the bills of costs; and that for any thing which appeared to the Court, there might be no item for business done in this Court, or even no taxable item at all.

Lord DENMAN, C. J.—As to the first—are these gentlemen attornies of this Court?

Hindmarch said they were.

Lord DENMAN, C. J.—Then we think there is nothing in the first objection: we must take notice that they are officers of the Court.

Hindmarch, in answer to the second objection, urged that the bills of costs were both of them exhibits, and sworn to in the affidavits. In each bill of costs was contained an item for preparing a warrant of attorney, and attending the execution of it. The two warrants of attorney themselves were produced, corresponding in date with the dates in the bills of costs, and attested by the attornies as witnesses; and it was sufficient that the bills themselves were produced and identified, as they would shew by inspection that they contained taxable items.

Per Curiam.—It must appear by the affidavits that the bills of costs contain taxable items; the rule must, therefore, be discharged.

Rule discharged.

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WENHAM v. FOWLE.

(Before the four Judges.)

THIS was an application by the defendant *Fowle* (in person) to stay a rule obtained by *Wenham* the plaintiff, (in person), in *Easter Term* last, of which the following is a copy, and that on the argument either party might be at liberty to refer to a certain trust deed. "*Wenham v. Fowle*. Upon reading the rule made in this cause, on *Friday*, the 17th day of *January*, in *Hilary Term* last past, and upon hearing the Master's report thereon, and upon hearing the plaintiff and defendant respectively in person, it is ordered, that the plaintiff be at liberty to issue a further execution against the goods, chattels, and effects of the defendant, (other than and except the necessary wearing apparel and bedding of the said defendant), and his or her family, and the necessary tools and instruments of his trade or calling, pursuant to the statute of 32 *Geo. 2*, c. 28, s. 17. By the Court."

The effect of an instrument under seal cannot be altered by a memorandum not under seal.

If a party obtains the benefit of a trust deed executed by his creditors, and in it is contained a consideration, that he shall make a full disclosure of his property, but he conceals a portion of it, the creditors signing the deed may still proceed against him.

It appeared, that, previously to *March*, 1826, *Fowle* and one *Stringer* were in partnership, and on the dissolution thereof, it was agreed, that *Stringer* should pay *Fowle* an annuity of 200*l*. In *March*, 1826, *Fowle*, by indentures of lease and release and assignment, conveyed and assigned all his real and personal estate set forth in a schedule thereto to trustees for the benefit of his creditors, save and except the above annuity, which it was thereby agreed *Fowle* should retain for his own use, but subject to a proviso, making the deed void in case *Fowle* should not have thereby conveyed all his real estate, or in case it should thereafter be discovered that he had made or contemplated a concealment of any part of his personal estate, or should not have assigned or given information of the same, other than his or his wife's wearing apparel, &c. *Wenham* himself did not at this time execute the deed of trust, but proceeded to obtain judgment against *Fowle* in the

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present action for a debt of 200*l.* and upwards, and for which he afterwards charged him in execution. In *Easter* Term, 1827, *Fowle* was brought into the *Bail* Court by *Wenham*, under the compulsory clause of the Lords' Act, in order that he might give an account of his property; and on his being questioned by *Wenham* as to the annuity, he objected to account for it, on the ground that it had been set apart for his own use by the trust deed. But the learned Judge (*Bayley*) thought, that, as *Wenham* had not executed that deed, *Fowle* was bound to insert the annuity in his schedule. *Fowle* subsequently filed such schedule, in which he stated that he had no real or personal estate, the whole having been conveyed and assigned as before mentioned, save and except the annuity in question, which he claimed to hold as having been exclusively reserved by the trust deed for his own use, but which he thereby offered to give up until *Wenham's* claim for debt and costs should be satisfied, provided the Court should be of opinion, that it would legally pass to a creditor, and so order and direct, and *Wenham* be able to obtain payment in law. Whereupon *Fowle* was ordered to execute to Mr. *Chapman*, in his official character as assistant Master, an assignment of all his real and personal estate and effects in trust for *Wenham* in the usual manner. *Fowle* duly executed that assignment, and was thereupon discharged out of custody. In 1828, a meeting of all parties took place, when Mr. *Chapman*, as *Wenham's* assignee, executed *Fowle's* trust deed, and received a dividend under the same. *Fowle*, at the same time, by the direction of Mr. *Chapman*, signed the following memorandum at the foot of the schedule and assignment:—"I consent to the assignee within mentioned executing a certain deed, dated the 31st day of *March*, 1826, made between me of the first part, *John Morris*, *Charles Jennings*, and *William Judson*, of the second part, and the several other persons creditors of me, of the third part, without prejudice to any proceedings that may hereafter be advised to be taken to

compel recovery of the within-mentioned annuity. *William Fowle*." About a year after the execution of the trust deed by Mr. *Chapman*, *Wenham* got intelligence of a certain mortgage transaction, in respect of which *Fowle* was entitled to about 200*l*. Also, of a deed or agreement, dated in *March*, 1825, being one year before the date of the trust deed, by which *Fowle* agreed to transfer his interest in the mortgaged premises to a Miss *Elliott*, his sister-in-law, for 125*l*., the particulars of which he afterwards communicated to *Fowle's* trustees. The trustees made inquiries, and ultimately received and divided the mortgage money, less *Wenham's* share thereof, and which they would have paid over to Mr. *Chapman* but for a notice from *Wenham* to that gentleman requiring him not to receive it. At the time the trust deed was executed by Mr. *Chapman*, an action was pending against *Stringer*, the grantor of the annuity, at the suit of *Fowle*, for the recovery of the arrears thereof, a fact which neither Mr. *Chapman* nor *Wenham* were then aware of. That action was afterwards compromised by *Fowle's* receiving through his attorney from *Stringer* 760*l*., as after mentioned. *Wenham*, having now heard or observed that *Fowle's* pecuniary affairs were much improved, sued out an execution against him, whereupon *Fowle* applied to a Judge at chambers to have it set aside, and satisfaction entered on the roll, on the ground that *Wenham* was barred by Mr. *Chapman's* execution of the trust deed as his (*Wenham's*) assignee. That application was opposed by *Wenham*, who contended that the concealment, in regard to the mortgage transaction above mentioned, rendered the trust deed void. The matter was referred by Mr. Justice *Littledale* to Mr. *Chapman*, who was directed to report thereon to the Court. Mr. *Chapman* made his report in *Easter Term*, 1832, stating in substance, that the mortgage transaction was attended with great suspicion, but that as the trustees had subsequently obtained the mortgage mo-

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ney, he did not feel himself at liberty to question the validity of the deed, and therefore, instead of saying the execution should stand, he merely observed that, in his opinion, satisfaction ought not to be entered on the roll of *Wenham's* judgment. Whereupon the Court, in the same *Easter* Term, set aside the execution in question, and ordered "that no further execution should be issued on the judgment without leave of the Court, or one of the Judges thereof." In *Michaelmas* Term, 1833, a rule *nisi* was obtained by *Wenham* for leave to issue a fresh execution on his judgment; and, on its coming on for argument in *Hilary* Term, 1834, it was referred to Mr. *Chapman* to ascertain what had been received by *Fowle* in respect of the annuity since the date of the trust deed, and whether any thing had been received since the above rule of *Easter* Term, 1832, and to report his opinion thereon. At the same time Mr. *Chapman* was directed to assign to *Wenham* all his interest under the assignment executed to himself by *Fowle* as before stated, and which he accordingly did. Mr. *Chapman* reported, that 760*l.* had been received by *Fowle's* attorney in respect of the annuity as before mentioned after the date of the trust deed; but that nothing had been received since the rule of *Easter* Term; and he stated his opinion to be, that the 760*l.* was received in full of all arrears of the annuity, and that when such rule issued, *Wenham* was not aware that any proceedings had been taken by *Fowle* to enforce payment. The Court, upon hearing this report, granted *Wenham* the rule now sought to be stayed by *Fowle*; and the only material question for the opinion of the Court was, whether such rule could be enforced in point of law. In the deed in question, there was no clause on which the memorandum could be engrafted, neither was the memorandum referred to by the attestation of Mr. *Chapman's* execution of that deed.

In support of the rule *Wenham* contended, that the me-

morandum signed by *Fowle*, authorizing Mr. *Chapman's* execution of the trust deed, was matter of agreement within the 21st section of the Lords' act; and that as it contained an express stipulation in regard to the annuity, the deed was completely controlled by it.

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Against this rule, *Fowle* contended, that the execution of the deed and receipt of the dividend thereunder by Mr. *Chapman* amounted to a complete release of *Wenham's* debt, notwithstanding such memorandum, on the ground that an obligation by deed could not be altered but by deed, unless some authority for a less formal mode of disputing it be annexed thereto.

Per Curiam.—We are of opinion, that the effect of this deed cannot be altered by the memorandum, it not being under seal. But it appears, that *Fowle* did not furnish the trustees under the deed with the requisite information as to the mortgage transaction, and other matters, and therefore he is not entitled to the benefit of it. The rule, therefore, for staying the rule of *Hilary* Term last, giving *Wenham* liberty to issue a further execution against the goods, chattels, and effects of *Fowle*, must be discharged, but without costs.

Rule discharged, without costs.

REX v. The Justices of HAMPSHIRE.

THIS was an application to obtain a writ of *certiorari* to be directed to certain justices of the county of *Hants*, requiring them to return a conviction by them of a person named *Roberts*, for taking improperly certain tolls on a

A mere claim of a right to take certain tolls, without shewing clearly that it is a *bond fide* claim, is not sufficient to oust

justices of the jurisdiction to convict for taking them improperly.

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certain road, contrary to the provisions of a private act of Parliament. The ground of the application was, that the tolls had been taken under a claim of right, and therefore that the justices had no jurisdiction. A rule *nisi* was obtained, and afterwards cause shewn against it.

Cur. adv. vult.

TAUNTON, J.—Mr. *Crowder* obtained a rule *nisi* for a writ of *certiorari*, to remove into this Court a conviction by certain justices of a person named *Roberts*, for taking a greater toll than by law he was entitled to do, and it was obtained on the ground that the justices had no jurisdiction. I cannot, however, entertain a doubt that they had jurisdiction under the statute over the subject matter. But it was argued, that *Roberts* had acted under a claim of right, and that he so contended before the justices, and that that ousted the justices of their jurisdiction. But I am of opinion, that, if *Roberts* did so act, the jurisdiction of the justices is not thereby taken away. They were to say, whether it was a *bond fide* claim of right or a mere pretence; for a mere *claim* of title to take a greater toll does not oust the magistrates of their jurisdiction. It appears that *Roberts* was collector under one *Mason*, the lessee; the statute gave certain specific tolls, and *Roberts* tendered the lease in evidence. That lease demised all and every the tolls and duties arising and to be paid and collected at the tollgate; and it was said that the demise being of *all* the tolls, the collector was excused from a penalty for taking the toll in question. But the affidavits do not shew what was the nature and amount of the tolls taken by *Roberts*. How, therefore, is it possible to say whether his claim was *bond fide*, or a mere illusory pretence? [*Crowder*.—The affidavit states and sets out what tolls the act of Parliament grants, and states that *Roberts* took those tolls.] It is

consistent with the affidavits that he might have taken those tolls, but not in this particular instance. The affidavits are not sufficiently certain; it does not appear that he took the statutable toll in this particular instance. The demise of "*all*" tolls was only of all *species* of tolls; that is the meaning of the word *all*. It is stated that the statute gives the trustees or justices power to reduce the tolls; but whether they have done so does not appear in the affidavits. On the whole, I am of opinion that the justices had jurisdiction over the subject matter, and that it was not taken away by a mere claim of right on the part of the collector; for they were to judge whether it was a *bona fide* claim or not. They have done so, and have found that it was not; and as I cannot say they have done wrong, the rule must be

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Discharged, with costs.

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R. v. RICHARDS shewed cause against a rule *nisi*, obtained by *Mansel* for setting aside the judgment signed in this case, and the *ca. sa.* issued thereon, and for discharging the defendant out of custody on various grounds. It was an action brought to recover a sum of money due from the defendant to the plaintiff. After the action was commenced a *cognovit* was given by the defendant for the amount in these terms: "In the *King's Bench*, between *Joseph Rose*, plaintiff, and *John Tomblinson*, defendant. I confess this action, and that the plaintiff hath suffered damages to the amount of 50*l.*, besides his costs and charges to be taxed; but no judgment is to be signed, or

Under a *cognovit*, by which it is agreed, that no judgment is to be signed, or execution issued, unless default made in payment of a certain sum, with costs, by instalments, the plaintiff may sign judgment and issue execution for the whole sum if default is made in one instalment.

A *cognovit* containing terms of agreement must be stamped; but it is sufficient, to support an execution under it, if it is stamped by the time cause is shewn against a rule for setting aside the execution, on the ground of its not having been stamped.

A variance between the sheriff's warrant and a *ca. sa.* lodged in his office is immaterial.

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execution issued, unless default shall be made in payment of 25*l.*, together with the aforesaid costs, by instalments of 10*s.* each calendar month, the first thereof to be payable on the 14th day of *June* next, and a similar one on the 14th day of each succeeding month till the whole be paid. Dated the 14th day of *May*, 1834. *John Tomblinson*. Witness, *John Parrott*." Several of the instalments due under the *cognovit* not having been paid, the plaintiff signed judgment for the whole amount of 25*l.* and the costs which had accrued. This, he contended, the plaintiff had a right to do, as from the language of the *cognovit* the defendant must be taken to have agreed, that, in case of his making default in payment of any one instalment, the plaintiff should be at liberty to sign judgment for the whole. The second objection was, that the *cognovit*, containing terms of agreement, ought to have been stamped. Whether it ought to have been stamped or not previous to signing judgment could now be of no consequence, because the plaintiff had paid the penalty, and got it stamped. The third objection was, that the warrant issued by the sheriff on the *ca. sa.* did not pursue the language of the writ, and therefore that the defendant was illegally detained: the writ being on "promises," and the warrant for "damages." This variance was unimportant, because the warrant was not the authority under which the sheriff would justify in case of an action being brought against him, but he would justify under the writ itself. If the person mentioned in the *ca. sa.* was arrested by the sheriff, the writ would be a sufficient justification to him, no matter what might have been the language of the warrant.

Mansel, contra.—With respect to the first point: From the peculiar language in which this *cognovit* has been framed, the plaintiff can only be entitled to issue execution for each sum of 10*s.* as it becomes due. It may be

inconvenient that the plaintiff should be compelled to issue execution for each sum as it becomes due, or for the whole amount of the money due; but the instrument was prepared by himself, and therefore he must take the consequences resulting from endeavouring to put in force such an instrument. The question of inconvenience could not be taken into consideration by the Court. The sum here secured by the *cognovit* was in the nature of a penalty, and therefore the plaintiff ought not to enforce the payment of the whole for one default, unless there were such clear and distinct terms of agreement as shew such to have been the intention of the parties. Then, as to the second point, it is clear, that, as the *cognovit* contains terms of agreement, it ought to have been stamped, and stamped previous to signing judgment, and therefore producing it now stamped cannot cure the defect.

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Bazett, *amicus curiæ*, mentioned a case of *Griffiths v. Liversedge*, before Mr. Justice *Patteson*, in which he had shewed cause against a similar rule to the present; and although the *cognovit* had not originally been stamped, the learned Judge held it sufficient if it was stamped at the time of shewing cause.

Mansel.—Then with regard to the variance between the warrant and the writ. Although the warrant might be a protection to the sheriff, it could be no protection to the jailor or other person detaining the defendant, as the Court had given no authority to detain him in such a case.

R. V. Richards mentioned the case of *Williams and Others v. Lewis (a)*, in which it was held that a defendant is not entitled to be discharged out of custody, on the ground of his having been arrested upon a warrant, in

(a) 1 Chitt. Rep. 611.

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which the names of the plaintiff are not conformable to the writ, if the defendant be not misled by the mistake; and, therefore, where the arrest took place on a warrant, which required the defendant to answer *A. B.* and two others, the Court refused to discharge him;—and the case of *Astley v. Goodjer* (*a*), where it was held that it is not necessary that the sheriff's warrant issued upon a *capias* should specify the Court out of which the process issues.

Cur. adv. vult.

LITLEDALE, J.—This was a rule obtained by Mr. Mansel for setting aside the judgment signed in this case, and the *ca. sa.* issued thereon, and for discharging the defendant out of custody. Judgment has been entered up on a *cognovit*, which was in these terms:—"I confess this action, and that the plaintiff hath sustained damages to the amount of 50*l.*, besides his costs and charges to be taxed; but no judgment is to be signed, or execution issued, unless default shall be made in payment of 25*l.*, together with the aforesaid costs, by instalments of 10*s.* each calendar month," to be payable on certain days. Several objections were made to the plaintiff's right to detain the defendant, but in the end they resolved themselves into three.

The first was, that the judgment ought not to have been entered up, or the execution issued for the whole amount of the judgment, but only for the instalments due. Secondly, that the *cognovit* containing terms of agreement ought to have been stamped. Thirdly, that the warrant by the sheriff did not pursue the language of the *ca. sa.*, and that the defendant was illegally detained in custody.

As to the first of these objections, it was contended by the defendant that this was in the nature of a penalty,

(*a*) Ante, Vol. 2, p. 619.

and that the plaintiff ought not to enforce the payment of the whole at one time, unless there were clear distinct terms of agreement on the part of the defendant authorizing the plaintiff to do so; and to shew the opinion of the profession at large upon this kind of contract, it is always usual to make an express stipulation, that, in default of paying any one instalment, execution may issue for the whole. There is no doubt that such a clear and distinct stipulation is very usual; and there is no doubt, also, that, if the parties have not agreed that execution shall issue for the whole, it shall not do so. But I think the terms of this *cognovit* do give such authority. Here, default has been made in payment of the sum of 25*l.* by the instalments mentioned in the *cognovit*. That default has been made if one instalment has been omitted, for when that occurs the 25*l.* cannot be paid in the manner stipulated. And if default has been made in payment of one instalment, the defendant has not relieved himself from the condition, on the non-performance of which judgment and execution may take place; and there is nothing in the *cognovit* from which it can be contended, that the parties meant that a new execution should issue from time to time for each default. This case very much resembles that of *Leveridge v. Forty and Another*(a). There the plaintiffs had sold their business and stock in trade to the defendants, for which they gave a warrant of attorney in the sum of 2805*l.* for securing the payment of 1402*l.* 18*s.* 8*d.*, with interest, to be paid by instalments of 150*l.*, with interest from the date of the warrant of attorney; the first instalment to be paid on the 24th of *June*, 1813, and the rest on the 24th of *December* and 24th of *June* successively, till the whole sum of 1402*l.* 18*s.* 8*d.*, with interest, should be satisfied; and that the plaintiff should be at liberty to enter up judgment thereon immediately, with this defeazance—"but no execu-

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(a) 1 Mau. & Sel. 706.

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tion to be issued until default made in payment of the said sum of 140*l.* 18*s.* 8*d.*, with interest as aforesaid, by instalments, and in the manner hereinbefore mentioned." Upon the first instalment becoming due, payment of it was demanded and refused, whereupon the plaintiff entered up judgment, and took out execution for the whole. There Mr. Justice *Le Blanc* said, "the defeazance is, that no 'execution is to be issued until default in payment of the said sum by the instalments, and in the manner before mentioned;' that is, in the manner prescribed by the warrant of attorney. Then by default in payment of the first instalment on the 24th of *June*, the party had failed in payment in the manner prescribed by the warrant of attorney, and so, according to the words of the defeazance, 'in the manner before mentioned.' If the party had meant to provide against execution being taken out for the whole, before the whole was due, he should have done so in express terms; but the only restraint on the plaintiff from taking out execution is, 'until default made in payment of the said sum by the instalments,' and default is made by non-payment of the first instalment." That case appears to me to have been properly decided.

Next, as to the question of the stamp. It is said that the *cognovit* ought to have been stamped before the judgment was signed. The constant practice at *Nisi Prius* has been to receive stamped instruments without inquiring, or requiring it to be inquired, when the stamp was affixed. And I consider the same rules apply to them on being exhibited or produced in Court, or before a Judge upon affidavit or otherwise, as at *Nisi Prius*. Besides the opinion of Mr. Justice *Parke* and Mr. Justice *Patteson*, and my own recollection and experience, I may refer to cases reported as having been decided in full Court, that of *Rogers and Another v. James (a)*, and *Pitman v. Hum-*

(a) 7 Taunt. 147.

frey (a). In the first of those the Court held, that a commission of bankrupt was supported on a debt due to the petitioning creditor in the character of executor, although he had not obtained a probate on a sufficient stamp at the time when the commission issued, he having afterwards obtained a valid probate, for that had relation back to the testator's death. In the latter case judgment and execution on a *cognovit*, embodying a matter of agreement of 20*l.* value, were set aside with costs for want of a stamp on the *cognovit*; but it was suffered to remain on the file, having been afterwards stamped; fresh judgment and execution issued on it, and the interlocutory costs given to the defendant on the rule for setting aside the former judgment and execution were set off against the final costs in the cause. From all this it appears, that the time of its being stamped is not what the Courts look to. I think, therefore, that the judgment and the *ca. sa.* are regular. But as the defendant prays by the rule to be discharged out of custody, the only remaining question is, whether, as the warrant varies from the *ca. sa.*, he is entitled to his discharge. The sheriff, having the *ca. sa.* in his hands, might have arrested the defendant without any warrant at all; and if an action were now brought against the sheriff for the arrest, he might justify under the *ca. sa.* without any thing more, inasmuch as he had the authority of the Court for the arrest at the time he effected it. But the defendant may say, that although the sheriff might so justify, yet his officers and the jailor could not, and that therefore the defendant is in an illegal custody, and ought to be discharged. But even admitting that such a custody was illegal, which I by no means do, still I think he is not entitled to be discharged. It is very true, that, if a party causes another to be illegally imprisoned, he shall not afterwards, by subsequently lodging or executing a legal

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process against him, detain him in custody; but that is not so here. If the defendant be now in the custody of the sheriff, he becomes so under all writs which are in the sheriff's office, and therefore the defendant, by being in the custody of the sheriff under this warrant, becomes so in respect of all writs in the office, and amongst them of this *ca. sa.* It does not fall within the class of cases, where the plaintiff avails himself of a prior illegal caption to lodge or execute subsequently a valid process against him. Here the process is lodged before the warrant issues; and that process being in his hands, I think the defendant cannot, in this form of proceeding, claim to be discharged out of custody; and, therefore, that this rule must be discharged. But as the plaintiff himself has partly occasioned this application, by not having the *cognovit* stamped at the time when the execution issued, and as the warrant varied from the *ca. sa.*, I think these two facts afforded some reasonable ground for the defendant asking to be relieved, and therefore the present rule may be discharged without costs.

Rule discharged, without costs.

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Semble, that if an attorney has been admitted and does not take out his certificate for a year, he need not be re-admitted previous to taking it out; but whether he need or not, if he has taken out his certificate under such circumstances, the client's interest will not be affected.

PLATT shewed cause against a rule *nisi*, obtained by **Mansel** for setting aside the judgment on a warrant of attorney, and the *testatum capias* issued thereon, for irregularity, and discharging the defendant out of custody. The facts of the case were these:—The plaintiff's attorney had omitted to take out his certificate after he had been admitted. After remaining more than a year without a certificate, he took it out and began to practise. After he

had taken out his certificate, he had signed the judgment and issued the execution, by virtue of which the defendant was now detained. The objection to the proceedings was, that the attorney having been admitted and not taken out his certificate for more than a year; he was virtually off the roll, and, therefore, that he could not practise without re-admission. The question, therefore, in this case was, whether the attorney ought to have been re-admitted, having allowed more than a year to pass without taking out his certificate after his admission. That a re-admission under such circumstances was not necessary was shewn in the case of *Ex parte Jones (a)*. In that case, Mr. Justice *Parke* held, that where an attorney has been admitted, but has never taken out his certificate, he is entitled to take it out without re-admission. But, supposing that he had no right to practise in consequence of his omission to take out his certificate, the plaintiff ought not to be damaged by that omission. He cited *Reeder v. Bloom (b)*, where it was held that the circumstance of the plaintiff's cause having been conducted by a person who was not an attorney, does not deprive the plaintiff of his right to full costs against the defendant (c). If even the attorney were liable to a penalty, that was no reason why the client should be injured.

Mansel, in support of the rule.—The question is, whether the attorney, after being admitted, ought not within a year to have taken out his certificate; and if he ought, whether he can take it out after expiration of the year without re-admission. After omitting for one whole year, subsequent to his admission, to take out his certificate, he could not take it out without re-admission. The fact of

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(a) Ante, Vol. 2, p. 451.

(b) 3 Bing. 9.

(c) See further — *v. Sexton*, ante, Vol. 1, p. 180; and *Smith v.**Wilson*, Id. p. 545; *Meekin v.**Whalley*, ante, Vol. 2, p. 823;and *Humphrey v. Harvey*, Id. p. 827.

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his being admitted, and not taking out his certificate within a year, was, in fact, misconduct on the part of the attorney. This is shewn by looking to what was the foundation of the 37 *Geo. 3*, c. 90, namely, the previously existing rules of Court. By *Hil. 23 Car. 1*, 1647 (a), it was ordered "that all attornies of this Court, not attending personally here in Court in three weeks of *Easter* next, be put off the roll." Again, by *Mich. 1654* (b), it was ordered "that all officers and attornies of this Court appear in person in this Court upon or before the 14th day of *Michaelmas* Term, and upon or before the 7th day of every other term, upon pain of 10*s.* for the first default, 20*s.* for the second default, and putting out of the roll upon the third default; the appearance to be entered with the prothonotary, and the defaulters to be delivered to the Court upon oath, if required, within three days after the time appointed for appearance. That such attornies as have not been attending their employment in the Court by the space of one year last past, unless hindered by sickness, be not allowed their privilege of attornies." Then comes the 37 *Geo. 3*, c. 90, which enacts "that every person admitted, sworn, inrolled, or registered a solicitor, attorney, notary, proctor, agent, or procurator, in any of his Majesty's Courts at *Westminster*, or any ecclesiastical Court, or in any of the Courts of admiralty or cinque ports, the Great Sessions in *Wales*, or any Courts in the counties palatine, or in any other Court in that part of *Great Britain* called *England*, holding pleas, where the debt or damage shall amount to 40*s.* or more, shall annually, between the first day of *November*, at the end of *Michaelmas* Term then next following, during such time as he shall continue so to practise in any of the said Courts, or before such persons shall commence, carry on, or defend any action or suit, or any proceedings whatsoever in any

(a) 1 Gude's Crown Off. Prac. p. 312.

(b) *Ib.* p. 314.

of the said Courts, deliver in to the commissioners appointed to manage the duties on stamped vellum, parchment, and paper, or to their officer or officers appointed by them, at the head office of stamps in *Middlesex*, a paper or note, in writing, containing the name and usual place of residence of such person; and thereupon, and upon payment of the duties by the said act imposed, according to the place of his residence described in such paper or note in writing, every such person shall be entitled to a certificate duly stamped, to denote the payment of the duty by the said act imposed, according to the place of residence described as aforesaid; which certificate the said commissioners, or such person or persons who shall be appointed by the said commissioners, shall cause to be immediately issued under the hand and name of the proper officer, in such form as the said commissioners shall devise." By s. 30 of the same act, it is further provided, " that if any person shall, in his own name, or in the name of any other person or persons, sue out any writ or process, or commence, prosecute, carry on, or defend any action or suit, or any proceedings in any of the Courts aforesaid, for or in expectation of any gain, fee, or reward, or shall do any act in any of the said Courts as an attorney, solicitor, notary, proctor, agent, or procurator of such Court, without obtaining a certificate in the manner hereinbefore directed, or without entering the same in one of the Courts aforesaid, wherein such person shall be admitted, inrolled, sworn, or registered as solicitor, attorney, notary, proctor, agent, or procurator, or shall deliver unto any person at the said head office any account containing a place of residence, as the place of his residence, contrary to the directions of the said act of the twenty-fifth year of the reign of his present Majesty aforesaid, with the intent to evade the payment of the higher duties of five pounds by the said act imposed, every such person shall, for every such offence, forfeit and pay the sum of 50*l.*, and shall be

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and is hereby made incapable to maintain or prosecute any action or suit in any Court of law or equity for the recovering any fee, reward, or disbursement, on account of prosecuting, carrying on, or defending any action, suit, or proceeding, or having prosecuted, carried on, or defended any action, suit, or proceeding, or any matter or thing relating thereto, without such certificate as aforesaid." These sections may, in fact, be considered as embodying the former rules. When the attorney has obtained his admission, it is his duty to take out his certificate; and if he neglects so to do for a year, his admission is null and void. Sect. 26 only shews how he is to take out his certificate, and ss. 30 and 31 the penalties on not doing so. In *Ex parte Nicholas* (a), it was held, that the admission of an attorney, who has omitted to take out his certificate for one whole year after his admission, is absolutely void, and he must be re-admitted before he can practise. He cited *Pearce v. Whale* (b), *Slack q. t. v. Wilkins* (c), *Latham v. Hide* (d), and *Grice v. Allen* (e). If he were off the roll, he was not an attorney, and therefore all proceedings conducted by him must be irregular.

Cur. adv. vult.

LITTLEDALE, J.—This was an application to set aside the judgment signed in this case on a warrant of attorney, and the *testatum capias* issued thereon, and to discharge the defendant out of custody, on the ground that the attorney who conducted the proceedings was not an attorney of the Court at the time, and consequently that all proceedings were void or irregular. It appeared by the affidavits, that the attorney had been regularly admitted an attorney, but that he had not for above a year taken

(a) 6 Taunt. 408; 2 Marsh.
123, S. C.
(b) 7 D. & R. 512; 5 B. & C.
38, S. C.

(c) 3 Tyr. 158.
(d) Ante, Vol. 1, p. 594.
(e) Barnes, p. 414.

out his certificate pursuant to the statute of the 37 Geo. 3, c. 90, ss. 30 and 31. It was, therefore, contended, that he had become completely off the roll, and, consequently, that he could not be restored to it without the special order of the Court, but which had not been obtained. The plaintiff, in answer, urged that the attorney had not practised within the year, and that, therefore, upon the construction of the before-mentioned statute, he was not bound to be re-admitted before he took out his certificate. The plaintiff relied on the case of *Ex parte Jones* (a), where Mr. Justice *James Parke* (now Mr. Baron *Parke*) decided that point, and he was of opinion that re-admission under such circumstances was unnecessary. On the other hand, the defendant cited *Ex parte Nicholas*, which was a contrary decision by the full Court of *Common Pleas*. Several other cases were referred to as bearing on the point. If the question were now to be decided for the first time, I feel inclined to think that the decision in *Ex parte Jones* is the correct one; but I do not feel that I, as a single Judge, can overrule the decision of a full Court, more particularly where doubts may reasonably be entertained on the subject, and as I do not think it necessary to decide that point in the consideration of this rule. I therefore give no opinion upon it. But the plaintiff says, that, admitting the defendant may be right on the point with respect to re-admission, still the plaintiff is not to be affected by this omission of the person employed by him as his attorney; and that, as he was ostensibly an attorney, and had been regularly admitted, and as there are no grounds for saying that the plaintiff was aware of the imperfection in his qualification, he ought not to be prejudiced. A great number of cases have been cited on both sides applicable to this point; but it is not a very easy matter to collect what is the general principle established by them. I find

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(a) Ante, Vol. 2, p. 251.

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none, however, which decide that the proceedings are irregular, because the attorney has not been regularly admitted. It would be of most mischievous consequence if such proceedings were determined to be irregular. Clients are not to be expected to send up to inquire at the proper offices, whether persons ostensibly acting as attorneys have taken out their certificates in proper time. If that were so, and the interests of clients were to be affected on that account, such an omission might deprive articted clerks of the benefit of their articles.

On the whole, I think, therefore, that this rule should be discharged; but as the law does not seem very clearly settled on these points, I think it should be discharged without costs.

Rule discharged, without costs.

RIVETT, Assignee, v. LARK.

Sec. 57 of the
 7 Geo. 4, c. 57,
 (the Insolvent
 Act), which au-
 thorizes execu-
 tion in certain
 cases against an
 insolvent who
 has obtained his
 discharge, does
 not apply to a
ca. sa.

PLATT shewed cause against a rule *nisi* obtained by *Kelly*, for discharging a defendant out of execution in three actions. The defendant was an insolvent debtor, and, on being brought up to be discharged under the insolvent act, he executed the warrant of attorney provided by the 7 Geo. 4, c. 57, s. 57. After the discharge of the insolvent, an application was made to the Insolvent Debtors' Court for leave to sue out execution against other property, to which it was suggested the defendant had become entitled. A *fi. fa.* was accordingly sued out, under which a sum less than twenty shillings was levied. A *ca. sa.* was then sued out against the person of the insolvent, and on that he was taken. The present application was, therefore, made on the ground, that, although the warrant of attorney authorized the entering up judgment and issuing execution, it authorized no other execution than one

against the property of the insolvent, and consequently not against his person. He should contend, however, that, according to the true construction of the act, the executions here issued were right. The words of section 57 were, " that before any adjudication shall be made in the matter of the petition of any such prisoner, the said Court, or commissioner, or justice, shall require such prisoner to execute a warrant of attorney, to authorize the entering up of a judgment against such prisoner in some one of the superior Courts at *Westminster*, in the name of the assignee or assignees of such prisoner, or of such provisional assignee, if no other assignee shall have been appointed, and shall have accepted such office, for the amount of the debts stated in the schedule of such prisoner so sworn to as aforesaid to be due, or claimed to be due, from such prisoner, or so much thereof as shall appear at the time of executing such warrant of attorney to be due and unsatisfied; and the order of the said Court for entering up such judgment shall be a sufficient authority to the proper officer for entering up the same, and such judgment shall have the force of a recognizance; and if at any time it shall appear to the satisfaction of the said Court that such prisoner is of ability to pay such debts, or any part thereof, or that he or she is dead, leaving assets for that purpose, the said Court may permit execution to be taken out upon such judgment for such sum of money as, under all the circumstances of the case, the said Court shall order, such sum to be distributed rateably amongst the creditors of such prisoner, according to the mode hereinbefore directed in the case of a dividend made after adjudication; and such further proceedings shall and may be had upon such judgment as may seem fit to the discretion of the said Court from time to time, until the whole of the debts, due to the several persons against whom such discharge shall have been obtained, shall be fully paid and satisfied, together with such costs as the said Court shall

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think fit to award." Under this section, the warrant of attorney is given; but I apprehend we are to look to section 60, in order to see under what circumstances, and in what manner, it is to be enforced. By that section it is provided, "that no person who shall have become entitled to the benefit of this act by any such adjudication as aforesaid, shall at any time thereafter be imprisoned by reason of the judgment as aforesaid entered against him or her according to this act, or for or by reason of any debt, or sum of money, or costs, with respect to which such person shall have become so entitled, or for or by reason of any judgment, decree, or order for payment of the same; but that upon every arrest or detainer in prison upon any such judgment so entered up as aforesaid, or by or by reason of any such debt or sum of money, or costs, or judgment, decree, or order for payment of the same, it shall and may be lawful for any judge of the Court from which any process shall have issued in respect thereof, and such judge is hereby required, upon proof made to his satisfaction that the cause of such arrest or detainer is such as hereinbefore mentioned, to release such prisoner from custody." The latter end of the section then gives the explanation of the nature of the process contemplated as issuing against the defendant. The section proceeds, "unless it shall appear to such Judge upon inquiry that such adjudication as aforesaid was made without due notice, where notice is by this act required, being given to or acknowledged by the plaintiff or such process, or being by him or her dispensed with by the acceptance of a dividend under this act, or otherwise; and at the same time, if such Judge shall in his discretion think fit, it shall and may be lawful for him to order such plaintiff, or any person or persons suing out such process, to pay such prisoner the costs which he or she shall have incurred on such occasion, or so much thereof as to such Judge shall seem just and reasonable, such prisoner causing a common appearance

to be entered for him or her in such action or suit." Therefore, the condition to be performed, in order to relieve the prisoner, is, that he shall enter a common appearance in such action or suit; and that gives a description of the process to which the legislature referred. It is true, that, in the commencement of the section, the word "judgment" is used, but an action may be maintained on a judgment. It is therefore quite plain, that when the condition, on the performance of which the defendant's discharge depends, is stated to be entering an appearance, the legislature referred to mesne process, and not final process.

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LITLEDALE, J.—Then you mean to contend that this clause does not apply to any case in which a *ca. sa.* is issued against the person of the defendant? Did you ever know an instance of an action brought against an insolvent, on a judgment signed in pursuance of the warrant of attorney?

Platt.—I apprehend it may be done, although persons generally pursue a different course.

Kelly, *contrà*, submitted, that, if an arrest were allowed under such circumstances, the decision of the Court would in fact go to repeal the Insolvent Act itself.

Platt.—That is not the necessary consequence, for the warrant of attorney is under the control of the Insolvent Court; and if the defendant thinks himself aggrieved, he may apply to that Court for relief; but he is mistaken in making his application here.

Kelly, *contrà*, was stopped by the Court.

LITLEDALE, J.—When the word "execution" is mentioned in section 57, the legislature must have contemplated

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an "execution," which can be of use to the creditors, for the sum recovered is "to be distributed rateably amongst the creditors of such prisoner;" but *non constat*, that, when a *ca. sa.* is issued, any fruits will be obtained under it. Besides, I do not think that the Insolvent Court could interfere with the process of this Court. Again, the word "Judge," mentioned in section 60, clearly contemplates a Judge of this Court, because the words of the section are, "any Judge of the Court from which any process shall have issued in respect thereof." But I cannot imagine that section 57 applies to a *ca. sa.*, and that that species of execution may be issued under the authority of the Insolvent Court. If that Court had power to order a *ca. sa.* to be issued, that power would be rendered nugatory if a Judge of the superior Court, under section 60, could discharge the defendant out of custody. The present rule must therefore be made absolute.

Rule absolute.

PARMETER and Another v. OTWAY.

In an action on a promissory note, and for goods sold and delivered, the defendant cannot change the venue without disclosing his ground of defence, and his application cannot be made before issue joined.

GUNNING shewed cause against a rule *nisi* obtained by *Dowling* for changing the venue from *London* to the county of *Norfolk*. The action was brought on a promissory note, and for goods sold and delivered. The amount of the note was 20*l.*, and of the goods sold and delivered 40*l.* The particulars of the plaintiff's demand stated, that the note had been given for a portion of the 40*l.*, the balance of account claimed by the plaintiff. In support of the rule, an affidavit had been made by the defendant, which stated, first, in the common form, that the plaintiff's cause of action, if any, arose in the county of *Norfolk*, and not elsewhere; and, secondly, that the witnesses on both sides were resident in that county, and that it would be very inconvenient to bring them up to town. In answer

to this application he should contend, first, that the application was too early; secondly, that the action, being on a promissory note, the plaintiff was entitled to retain his venue where he had originally laid it, although there was a demand in his declaration for goods sold and delivered; and, thirdly, that the defendant's affidavit was insufficient. Upon the first point he cited *Cotterill v. Dixon* (a), where it was held, that, if a motion to change the venue depends on special grounds, it ought not to be made till after plea pleaded: there, Mr. Baron Bayley said, that "this motion being made on special grounds ought to be made after plea pleaded, because it cannot be previously known what issue is to be tried;"—*Weatherby v. Goring* (b), where the Court held that it would not before issue joined entertain a motion to change the venue in an action on specialty: there, the Court said, "until issue has been joined, the Court cannot tell whether the defendant intends to set up any defence to the action, and he cannot be entitled to change the venue in an action on specialty, unless it appears clearly that he will have some witnesses to examine on the trial of the cause." With respect to the second point he cited *Shepherd v. Green and Another* (c), where, in an action brought on a promissory note, the Court held that the plaintiff might retain his venue, although he sought to recover for other causes of action (d). As to the third point, he cited *Evans v. Weaver* (e), where, in an action on a promissory note, the Court refused to change the venue from *London* to the county where it was made, on the defendant's stating that *all* his witnesses lived there; but it required that the affidavit should shew the number of his witnesses, and that a serious inconvenience would arise from bringing them up. Here, however, the affida-

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(a) 3 Tyr. 705.

(b) 3 B. & C. 552.

(c) 5 Taunt. 375.

(d) See *Hart v. Taylor*, 2 D.& R. 164; and *Arden v. Mornington*, 4 Tyr. 56.

(e) 1 B. & P. 20.

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vit did not shew that there was any intention on the part of the defendant to call witnesses. In *Ladbury v. Richards* (a), which was an action of debt on bond, the Court refused to change the venue from *London* to *Worcester*, on an affidavit stating that all the plaintiff's and defendant's witnesses resided at the latter place, and required that the affidavit should state the nature of the defence to the action. No such disclosure, however, was here made. No statement either was introduced that the defendant had any merits. This was decided in two cases to be necessary. The first was an *Anonymous* case (b), where the Court held, in an action on a specialty, that the venue could not be changed on the ground that the cause of action arose in a different county, and that both parties and all the witnesses resided there, unless an affidavit of merits were made; and it was also shewn to be necessary to call witnesses resident in the latter county. In *Johnson v. Beresford* (c), the same doctrine was laid down. On these grounds, he submitted, that the present rule ought to be discharged.

Dowling, contra, distinguished all the cases which had been cited on the other side, with the exception of *Shepherd v. Green and Another*, as being actions on specialties; and therefore that a more strict rule would be adopted by the Courts in the practice, on this point, with respect to them. This case was also distinguishable from that of *Shepherd v. Green and Another*, because it did not appear from the declaration there, whether the whole demand for goods sold and delivered was or was not independent of the promissory note; but here the particulars of demand shewed that the promissory note was actually given for a portion of the demand for goods sold and delivered, and therefore it was in substance an action for goods sold

(a) 7 J. B. Moore, 82.

(b) 2 Tyr. 501.

(c) 4 Tyr. 57.

and delivered. This case, therefore, differed from any which had been cited, as the plaintiff, by his own particular, admitted that the promissory note had only been used by him as a means of harassing the defendant, by laying the venue in a place far distant from that in which the cause of action really arose.

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LITLEDALE, J.—In this case it was necessary that a special application should be made to the Court, in order to change the venue, as it could not be changed on the usual affidavit. It must, therefore, be decided according to those rules which regulate other cases, where it is necessary to come to the Court with a special application. According to the late cases, a great deal more particularity than formerly appears to be required. I do not think, however, it is very distinctly laid down that there must be an affidavit of merits. On the authority, however, of *Ladbury v. Richards (a)*, I think the proposed defence intended to be set up ought to be fully disclosed. Unless that is done, I think sufficient is not shewn by the defendant to entitle him to change the venue. I think on that ground alone the rule ought not to be made absolute. It seems to me to have been required by the Court in some of the cases that the defendant should swear that he means to examine witnesses. I doubt very much whether that is necessary. I think that it is sufficient if the ground of his defence is fully disclosed. As the application is made in this case before plea, that is an additional ground why the venue should be retained in *London*, because special pleas being now required according to the new rules of pleading in such actions as the present, it is proper that the Court should see what the defence is, on which the defendant proposes to rest, in order that it may judge how far the affidavit is consistent with the defence alleged. I

(a) 7 J. B. Moore, 82. See also *Foster v. Taylor*, 1 T. R. 781.

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think, therefore, that where it is intended to make a special application to change the venue, it ought to be made before plea. The present rule must, therefore, be discharged.

Rule discharged, with costs.

BEVEN v. CHESHIRE.

If an infant assigns, by attorney, for error *coram nobis*, that he has improperly appeared in the action by attorney instead of guardian, it is not a mere irregularity, but a ground of error: still the Court will, on application, set the assignment aside, and allow the plaintiff in error to assign by guardian.

KELLY and *Theobald* shewed cause against a rule *nisi* obtained by *Thesiger*, for setting aside the assignment of errors by the plaintiff in error, and signing judgment of nonpros. The defendant below was an infant, and had from inadvertence appeared by attorney. Judgment having been obtained against him, he brought a writ of error *coram nobis*, on the ground of his improper appearance. After it was brought, an application was made to a learned Judge for the purpose of obtaining leave to assign errors by guardian. The learned Judge, for some unknown reason, would not grant the application. At that time, the period for assigning errors was about to expire. If it had expired, the plaintiff in error must have been nonpros. To prevent this consequence, and as he had no opportunity of applying to the Court in order to rectify the decision of a single Judge, he assigned errors by attorney. The present application was afterwards made to set aside this assignment, and enable the defendant in error to sign judgment of nonpros. It was difficult to understand the object of the application. If the object were merely to set aside the assignment by attorney, in order that the plaintiff might assign by guardian, there could be no objection to the application. But if it was to prevent their being assigned, and that a judgment of nonpros might be signed, the application would be resisted as perfectly unprecedented. It would in fact be to deprive a party of his

right to bring a writ of error, to which by law he was entitled. If it should be contended that this was an irregularity, then the defendant in error was too late in his application, for the assignment alleged to be irregular was on the 23rd of *May*, and the application to set it aside was not until the last day but one of *Trinity* Term, which was the 11th *June*. But it was not a mere irregularity, but a matter of substance, which might be the ground of a second writ of error. The proper course for the plaintiff to have pursued was, to have applied to the Court to compel the defendant to enter an appearance by guardian. The case of *Hindmarsh v. Chandler* (a) was an authority on this point. It was there held, that if a defendant, who is a minor, appears by attorney, the Court will, at the instance of the plaintiff, compel an amendment of the appearance by the substitution of a guardian. That shews, that the proper course is, if there is no proper appearance or assignment of errors, it may be a ground for compelling the party to enter an appearance, or assign errors, according to law, so as to make the record good. Besides, the object of this rule is, to obtain an advantage against third parties: the plaintiff in error, being an infant, could not satisfy the judgment; but bail have been put in, and the effect of the rule would be, to make them pay the amount of the judgment below, though bail is not required in error *coram nobis* (b).

Thesiger, contra.—This is not a mere irregularity, but a matter of substance, and therefore cannot be waived by the plaintiff not coming in the first instance. Here, however, great laches existed on the part of the plaintiff in error. By 11 *Reg. Gen. H. T. 4 Will. 4* (c), it is required, that, “within twenty days after the allowance of the

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(a) 7 Taunt. 488.

(b) *Back v. Trieste*, 8 East, 415.

(c) *Ante*, Vol. 2, p. 306.

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writ of error, in cases of error *coram nobis* or *coram vobis*, the plaintiff in error shall assign errors; and, on failure to assign errors, the defendant in error, his executors or administrators, shall be entitled to sign judgment of nonpros." Here the writ of error was allowed on the 3rd May, and yet no application was made for leave to assign errors by guardian until the 21st, only two days before the expiration of the twenty days. This must clearly be considered as laches, he well knowing that the application for leave to assign errors by guardian was necessary.

LITTLEDALE, J.—Suppose he had applied ten days before the time was out, and the Judge had refused, he could not have applied to another Judge, but must have come to the full Court. But it was vacation at that time, and therefore he was obliged to do something, or judgment of nonpros would have been signed against him.

Cur. adv. vult.

LITTLEDALE, J.—The plaintiff in error having brought a writ of error *coram nobis*, on the ground that his appearance was by attorney and not by guardian, he ought to have followed up his proceedings in order to correspond with that writ, by assigning errors by guardian. He was bound to assign errors in twenty days; and it appears that he did not apply for time to assign errors by guardian till a day or two before that period expired, and then he did not obtain permission so to do. But to prevent a nonpros he assigned errors by attorney. That was not usual, but he had no alternative, that he might not suffer a nonpros. The plaintiff below now applies to set that aside, and to sign judgment of nonpros, on the ground that the plaintiff in error ought to have assigned earlier and by guardian. It is said the plaintiff below comes too late, it being an irregularity; but I do not consider it as properly an irregularity; it is error, and would be the subject of a

second writ of error. I think, therefore, the present rule should be made absolute as far as setting aside the assignment of errors, but not for a nonpros: and the plaintiff in error should be at liberty to assign error by guardian. I cannot, however, give costs on either side.

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Rule accordingly.

DAVID ANDERSON v. ELL.

V. LEE shewed cause against a rule for an attachment for non-payment of a sum of 29*l*.

If there is a defect in intitling affidavits produced on shewing cause against a rule, the Court will allow the rule to be enlarged, in order that the title may be amended.

J. Jervis, in support of the rule, took a preliminary objection, that the christian name of the defendant was omitted in the intitling of the affidavits on which it was sought to shew cause.

V. Lee applied to enlarge the rule, until the intitling of the affidavit could be amended.

LITLEDALE, J.—As you shew cause, the rule may be enlarged for that purpose. If the affidavits objected to had been those on which the rule had been obtained, the amendment could not have been allowed. You may have the rule enlarged for four days, as it appears the parties reside in *Staffordshire* (a).

Rule enlarged accordingly.

(a) See *Phillips, Assignee &c., v. Hutchinson and Others*, ante, p. 20.

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GEACH v. COPPIN.

If a defendant deposits money in the hands of the sheriff, pursuant to the 43 Geo. 3, c. 46, s. 2, which is paid into Court, the defendant will not be allowed to take it out, unless he has put in bail according to the exigency of the *capias*, although such a deposit is not mentioned in the warning attached to that writ.

11. If, however, bail has been perfected, but not in due time, before the plaintiff takes the money out, he must make his election as to which security he will take.

PLATT shewed cause against a rule *nisi* obtained by **N. C. Rowe**, for taking a sum of money out of Court, which had been deposited in the hands of the sheriff under the 43 Geo. 3, c. 46, in lieu of bail, and afterwards paid into Court by him, on the ground of the defendant having perfected special bail. The question is, whether bail has been put in in due time, because, if the bail has been duly perfected, the defendant is entitled to have his money out of Court. That will depend on the construction to be put on the above-mentioned statute. By s. 2 of the 43 Geo. 3, c. 46, it was provided, "that all persons who shall from and after the first day of *June*, in the year of our Lord one thousand eight hundred and three, be arrested upon mesne process, within those parts of the United Kingdom of *Great Britain* and *Ireland* called *England* and *Ireland*, shall be allowed, in lieu of giving bail to the sheriff, to deposit in the hands of the sheriff, by delivering to him or to his under-sheriff, or other officer to be by him appointed for that purpose, the sum indorsed upon the writ by virtue of the affidavit for holding to bail in that action, together with ten pounds in addition to such sum, to answer the costs which may accrue or be incurred in such action up to and at the time of the return of the writ; and also such further sum of money, if any, as shall have been paid for the king's fine upon any original writ; and shall thereupon be discharged from such arrest as to the action in which he, she, or they shall so deposit the sum indorsed on the writ; and the sheriff shall, in every such case, at or before the return of the said writ, pay into the Court in which such writ shall be returnable, the sum of money so deposited with him as aforesaid; and thereupon, in case the defendant or defendants shall afterwards duly put in and perfect bail in such action, according to the course and practice of such Court, the sum of

money so deposited and paid into Court as aforesaid, shall, by order of the Court, upon motion to be made for that purpose, be repaid to such defendant or defendants; but, in case the defendant or defendants shall not duly put in and perfect bail in such action, then and in such case the said sum of money so deposited and paid into Court as aforesaid shall, by order of the Court, upon a like motion to be made for that purpose, be paid over to the plaintiff or plaintiffs in such action, who shall be thereupon authorized to enter a common appearance, or file a common bail for such defendant or defendants, if the said plaintiff or plaintiffs shall so think fit; such payment to the plaintiff or plaintiffs to be made subject to such deductions, if any, from the sum of ten pounds, deposited and paid to answer the costs as aforesaid, as upon the taxation of the plaintiff's costs, as well of the suit as of his application to the Court in that behalf, may be found reasonable." In the present case, the defendant was arrested on the 29th of *August* for 50*l.*, and, on being taken, he paid that sum, together with 10*l.* for costs, into the hands of the sheriff in lieu of bail. On the 30th of *September* following bail was perfected, although the exigency of the writ was to put it in within eight days. An application was then made by the defendant to a Judge to take the money out of Court; but the application was refused, on the ground that it could be entertained by the full Court only. The writ requiring bail to be perfected within eight days after the execution of it, the time at which it was put in was too late, and therefore the defendant had not complied with the condition on which he was to be entitled to take the money out, which was of putting in bail according to the course and practice of the Court. The present rule ought, therefore, to be discharged.

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N. C. Rowe, in support of the rule.—The bail in this case was perfected in sufficient time. The section of the

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act in question provides "that the defendant may have the money out, provided he perfects bail in the action according to the course and practice of the Court." The question then is, what is the course and practice of the Court? Previous to the passing of the 2 & 3 Will. 4, c. 39, s. 11 (a), the defendant had a right to put in bail at any time before the return day of the writ during the vacation, and the provisions of that section do not narrow the practice on that point. The provisions therein contained are enabling, not imperative. They do not require that the defendant must perfect bail in vacation, but merely give him permission to put it in, without requiring him to justify. The question then is, whether the defendant was bound to justify, even if he did put in bail.

LITTLEDALE, J.—There is no difference between "putting in" and "justifying" bail in vacation, so far as the provisions of that act are concerned. It was so decided in the case of *Rex v. The Sheriff of Middlesex* (b).

N. C. Rowe.—The present case is very different from that of a sheriff who is in contempt by not putting in bail in due time. If the plaintiff had proposed to take advantage of bail not having been put in in due time, he should have made his application on the first day of term to take the money out of Court, and in not having done so he has been guilty of laches, which renders the present opposition too late. This case, however, must be viewed as different from cases which have occurred since the Uniformity of Process Act; for, on examining the warnings attached to the form of *capias*, it will be found that no mention is made of such a case as the present. The second warning refers to the case of a deposit under the 7 & 8 Geo. 4, c. 71; but such a one as this, under the 43 Geo. 3, c. 46,

(a) See 3 Dowl. Stat. 152.

(b) Ante, Vol. 2, p. 286.

is altogether a *casus omissus*. This case, therefore, must be governed by the old practice, and the defendant can only be subject to the consequences resulting from not putting in bail, which would have existed previous to the passing of the late act. By that old practice, the defendant might at any time before the return day of the writ, which would not be until the next term, have justified bail, and then immediately have applied to take the money out of Court. The present case being governed by that practice, and bail having been put in and justified before the first day of term, the defendant is entitled to have the money out of Court.

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LITLEDALE, J.—According to the old practice, which existed previous to the passing of the Uniformity of Process Act, if you omitted to put in bail within four or six days, according to the county, after the sheriff was ruled to bring in the body, you could not have the money out of Court unless a special application was made for time to put in bail. If you obtained time, then you might; but, if you omitted for four or six days, according to the county, you were too late in making the application to the Court. The only question is, whether, if the bail be put in according to the old practice, that is sufficient to entitle the defendant to have the money out of Court. In the case of *Newman and Another, Assignees, v. Hodgson (a)*, the marginal note is in these terms: "Where money has been deposited in lieu of bail, and paid into Court pursuant to 43 Geo. 3, c. 46, and the defendant does not perfect bail in time, the plaintiff will be allowed, on motion, to take the money out of Court, though the defendant has rendered himself into custody since the time for putting in bail, if there be no affidavit of merits on his part." The case must, therefore, be determined by the consider-

(a) 2 B. & Adol. 422.

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ation of whether the bail was or was not put in in due time. I do not think the plaintiff can be considered as having waived his right to oppose your application to take this money out of Court, in consequence of his not having applied for that purpose himself. Besides, he may not have felt that his case was so clear as to entitle him to come at once to the Court. The only point is, whether or not bail was put in in due time. I will look into the cases and speak to the other Judges.

Cur. adv. vult.

LITLEDALE, J.—This was a rule obtained by the defendant, the object of which was, that he might be at liberty to take out of Court a sum of money paid in, together with 10*l.* for costs, under the 43 *Geo. 3*, c. 46, s. 2. That statute directs, that the money may be taken out of Court by a defendant, if he shall put in and perfect bail according to the course and practice of the Court. This case arises upon the 43 *Geo. 3*, c. 46, and not the 7 & 8 *Geo. 4*, c. 71, which latter statute applies only to paying a further sum of 10*l.*, and makes the money a deposit in lieu of bail to the action. A case upon that act might be different; for, as a prisoner may bail his person out of custody at any time before execution, the defendant may, perhaps, be allowed to bail his money (if such an expression may be used) out of Court.

I shall first dispose of the observations made on the part of the defendant, that, as the case of paying money into the hands of the sheriff as a deposit, and taking it out of Court, is not mentioned in the warnings at the foot of the form of *capias* given by the Uniformity of Process Act, the time of putting in bail, and the consequences which are to follow the omission so to do, are not to be regulated by the *capias*, but by the old practice of the Court; and that, according to that old practice, bail has been put in

in due time. But the case does not appear to me in that light. I think the old practice of putting in bail, according to the return of the writ in term time, is now entirely at an end. This argument would rather go to shew that the 43 *Geo. 3*, c. 46, must be considered as repealed altogether. And therefore it may further be urged, that this act of Parliament having now established a new form of process, requiring bail to be put in within eight days, and pointed out the consequences of not doing so, the power of depositing money with the sheriff no longer exists; and if so, the money has been deposited and paid into Court without any legal authority, and without conferring any right on the plaintiff to have any thing to do with it; and therefore it may be paid out of Court to the defendant. But I think the power of paying money into the hands of the sheriff was created as an appendage to the old practice, and still remains as an appendage to the new law, and is to be governed by the old principles on the subject. The Courts, whenever this money has been paid in, have exercised a discretionary power over it when the defendant has not put in and perfected special bail in due time. They sometimes extend the time of putting in bail, under the circumstances of the case, whether upon an affidavit of merits, or otherwise; and if the plaintiff applies to obtain it out of Court, they will see whether there is any reasonable ground of objection to the application on the part of the defendant; and they have also permitted the defendant to apply a portion of the money in satisfaction of part of the plaintiff's demand, assimilating it to paying money into Court. But this rule comes before the Court upon the mere naked point, whether the defendant having put in bail after the time, he is, as a matter of right, entitled to have this money out of Court. I think, upon looking at the facts, that, not having performed the conditions contained in the act of Parliament, he is not. But as the

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defendant has in fact put in bail, which have also justified, the plaintiff is not entitled to have both the money and the bail, and, consequently, he must elect which he will take. I think, therefore, that this rule must be discharged without costs, on the plaintiff consenting that the recognizance of bail shall be vacated.

Platt, on behalf of the plaintiff, then consented that the recognizance of bail should be vacated.

LITLEDAL, J.—Then the rule must be discharged without costs.

Rule discharged, without costs.

BOWLER v. BROWN.

(*Before the four Judges.*)

If an attorney neglects to take out his certificate between the 15th of *November* and the 16th of *December*, but before the expiration of the year he takes it out, he is entitled to recover his costs for business done during the uncertificated interval, if his neglect has not been wilful.

THIS was an action by an attorney to recover the amount of his bill. The defence at the trial was, that the business had been done by the plaintiff during a period when he was uncertificated. The plaintiff, it appeared, had omitted to take out his certificate between the 15th *November* and 16th *December*, immediately after the expiration of his previous certificate, but had taken it out before the 15th of *November* in the following year. The business was, however, done between the 16th of *December* and the taking out of the certificate. On the part of the defendant it was contended that the certificate, being taken out after business done, could not relate back to the time when it was done, so as to put the plaintiff in the same situation as he would have been if he had taken out his certificate regularly. The learned Judge directed the jury to find a verdict for the plaintiff, and at the same time gave leave to the defendant to move to set it aside and enter a nonsuit.

Carrington afterwards obtained a rule *nisi* for entering a nonsuit.

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Petersdorff shewed cause against the rule, and contended that the 37 Geo. 3, c. 90, had merely passed for financial purposes, and not as a protection to the public. It ought, therefore, to be construed in such a manner as would sufficiently protect the revenue without interfering with the rights of the attorney to sue. As the 37 Geo. 3, c. 90, only referred to annual certificates, if the certificate were taken out at any time within the year, the party obtaining it had sufficiently complied with the statute. From the language of that act, and the subsequent statutes, it was quite clear that the prohibitory clauses, interdicting the plaintiff from recovering for his costs, only applied to instances in which it could be shewn that the plaintiff had wilfully omitted to take out his certificate; and, as no evidence had been adduced, shewing such negligence to have been wilful, the plaintiff was entitled to recover. If a contrary decision were pronounced, this injustice would ensue, that a party who had omitted to take out his certificate for eleven months, might lose the profit of his business during that interval whatever might have been its amount; but if he had abstained altogether during the year from taking out his certificate, he might be re-admitted on paying a nominal fine, and then all his privileges would be restored. He cited *Skirrow v. Tagg* (a), where it was held that an attorney does not lose his privilege by neglecting to renew his certificate at the expiration of his former certificate, if he renew it within the space of one year. The Court then interposed and called upon—

Carrington, to support his rule, contended that the words of the statute, 34 Geo. 3, c. 141, s. 13, were ex-

(a) 5 M. & Sel. 281.

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press, that the certificate must be taken out between the 15th day of *November* and the 16th day of *December* in each year, and that, if it were not so taken out, it would be inoperative during a period previous to the time of its being taken out.

Lord DENMAN, C. J.—Such a defence as that now sought to be set up by the defendant is certainly not to be favoured. I am of opinion that the plaintiff is entitled to recover, as there was no evidence to shew that the plaintiff had wilfully neglected to take out his certificate. The language of the statute is clear, that the neglect to take out his certificate must be wilful. In the absence of any proof of such wilfulness, I think the plaintiff is entitled to recover. The present rule must therefore be discharged.

TAUNTON, J., PATTESON, J., and WILLIAMS, J., concurred.

Rule discharged.

REX v. the Sheriff of SURREY.

The Sheriff is bound to pay the necessary fee for opening the treasury during vacation, in order to file his return, if an order to make the return, under sect. 15 of the Uniformity of Process Act, has been made.

The 3 & 4 Will. 4, c. 67, s. 2, as to making writs of execution returnable immediately, applies to executions issued on judgments obtained both before and since it passed.

THIS was an application on the part of the Sheriff of *Surrey* to set aside an attachment for irregularity. It appeared that an action was commenced by the prosecutor of the attachment in the year 1824. Execution not having been issued for more than a year, it was revived by *scire facias*. On the judgment so revived, a *fi. fa.* was sued out, the teste of which was the 14th *June*, 1834, two days after the expiration of *Trinity* Term. It was made returnable immediately. On the 16th *June* the plaintiff obtained a Judge's order to return the writ within six days. That period had expired on the 22nd *June*. The

Sheriff, however, made no return until the 30th of *June*. On that day he returned, that he had seized divers goods of the defendant, and that they remained in his hands for want of buyers. By the Sheriff's affidavit it also appeared that a prior writ of *fi. fa.* had issued in the vacation, under which he had seized goods which were afterwards sold in the month of *July*. The Judge's order for returning the writ was, pursuant to 13 *Reg. Gen. M. T. 3 Will. 4 (a)*, made a rule of Court, and an attachment obtained. It was sought to set aside this attachment on two grounds, the first of which was, that, as the Sheriff could not open the treasury in vacation for the purpose of filing his return without paying an extra fee of 5*s.* 10*d.*, and as he was not bound to pay that fee, he was not bound to file his return in vacation. The second ground was, that, as the *fi. fa.* here was founded on an original judgment obtained before the passing of the 3 & 4 *Will. 4*, c. 67, sect. 2, it could not be made returnable immediately, according to that act, which only contemplated executions issuing on judgments obtained after it had passed. Having been made here returnable immediately, it was irregular; it should have been, according to the old practice, made returnable in term.

On shewing cause against this rule, it was contended, on the part of the prosecutor, that, as the 2 *Will. 4*, c. 39, sect. 15, enabled "any Judge of either of the said Courts in vacation to make orders for the return of any such writ," and no provision or exception was introduced as to the treasury being open or not, the Sheriff, being bound to return the writ, was also bound to do all acts necessary for the purpose of returning it. With respect to the second point, it was contended that it was immaterial whether the *fi. fa.* had issued on a judgment originally obtained before the passing of the 3 & 4 *Will. 4*, c. 67, s. 2,

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(a) Ante, Vol. 1, p. 474.

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or one obtained since that act came into operation. The language of that section was perfectly general—"all writs of execution may be tested on the day on which the same are issued, and be made returnable immediately after the execution thereof" (a). These words clearly applied to all executions at whatever time the judgment might have been signed.

Cur. adv. vult.

LITLEDAL, J.—With regard to the point raised as to the payment of the fee of 5s. 10d. by the Sheriff for opening the treasury in vacation, I think that the Sheriff being bound to return the writ, if it was necessary that the treasury should be opened for the purpose of making the return, he was bound to make all payments, and do all acts required for that purpose; there being no exception on the point contained in s. 15 of the Uniformity of Process Act (b). The only question then is, whether the statute of 3 & 4 Will. 4, c. 67, s. 2, which authorizes the teste of writs in vacation, applies to cases where the proceedings had been commenced, and judgment obtained, before that statute; and I think the act applies to all cases. The terms of it are very precise and definite; and therefore I am of opinion, that it applies to all cases where the execution is sued out after the act. The judgment it appears was revived in this case by *scire facias*; but the execution is still a common execution, whether the judgment had been revived by *sci. fa.* or not. The rule, therefore, must be discharged; but it should be referred to the Master to take an account of what remains in the hands of the Sheriff, after satisfying the first execution, and the money paid by the Sheriff, &c., and with respect to his claim to poundage and expenses.

Rule discharged accordingly.

(a) See Dowl. Prac. p. 165.

(b) See 3 Dowl. Stat. 154.

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KIDD v. MASON.

HEATON applied for a rule to shew cause why the record in this case, which had been tried before the Under-sheriff of *Middlesex*, should not be brought into Court, in order to make an application for the purpose of depriving the plaintiff of his costs, under the 39 & 40 *Geo. 3*, c. 104, s. 12, (the *London Court of Requests Act*), on the ground that the plaintiff had recovered less than five pounds.

Previous to making an application with respect to costs, under the *London Court of Requests Act*, it is not necessary to have the record in Court.

LITLEDALE, J. (after consulting with the clerk of the rules, *Mr. Anlesbrook*).—You need not have the record in Court for the purpose of making such an application. The facts may be brought before the Court on affidavit. The application must be granted before it will be necessary to have recourse to the record.

Rule refused (*a*).

(*a*) See post, p. 96.

LANYON'S BAIL.

MANSEL opposed bail who had justified by affidavit pursuant to 3 *Reg. Gen. T. T.* 1 *Will.* 4 (*a*), on several grounds. The first objection was, that the bail in his affidavit stated that "he's" possessed, instead of "he is" possessed. He cited *Okill's bail* (*b*), where the Court held that the affidavit of justification must agree with the form given in the rules, and that it is not sufficient if it is only equivalent to such form.

"He's" is sufficient in an affidavit of justification instead of "he is."

The name of a township, without the name of a street, stated to be in a certain parish named in the notice of bail is sufficient.

It is sufficient for a bail to swear to property over and above "what will pay his just debts"

"Debts," without describing them as "book-debts," is sufficient. "Yeoman" is a good description of a bail.

(*a*) Ante, Vol. 1, p. 103.

(*b*) Ante, Vol. 2, p. 19.

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LITLEDALE, J.—I think that is sufficient, for “he’s” is only an abbreviated mode of spelling “he is.”

Mansel then objected that the bail on the notice was described as of “*Trevalsa*, in the parish of.” It then went on to state the name of the parish and county, but did not mention any street or place in the parish. But by 2 *Reg. Gen. T. T. 1 Will. 4 (a)*, it was ordered “that every notice of bail shall in addition to the description of the bail mention the street or place, and number, if any, where each of the bail resides.” Here, however, the rule had not been complied with, and if the parish in question were a large one, like *Mary-le-bone*, or *St. Pancras*, it would be quite impossible to find the bail.

LITLEDALE, J.—I think that is a sufficient description of the bail’s place of abode.

Mansel then objected that in the affidavit instead of stating that the bail was worth property to the required amount, “over and above his just debts,” he had sworn himself to be worth the required sum “over and above what will pay his just debts.”

LITLEDALE, J.—That is only amplifying the expression, conveying the meaning in a much more correct form than the one employed in the rules themselves. I think that is sufficient.

Mansel then objected that the bail, instead of swearing to “good book-debts owing to him,” had omitted the word “book.” He cited an *Anonymous* case (*b*), where it was held that it is not sufficient for the bail to describe himself as possessed of “money in the funds,” without stating in what fund it is.

(a) Ante, Vol. 1, p. 103.

(b) Ante, Vol. 1, p. 159.

LITTLEDALE, J.—That description of the debts is quite enough, because they may not be book debts. If it were necessary that they should be book-debts, then a man out of business altogether could not become bail in respect of good debts, no matter to what amount they might be.

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Mansel, lastly, objected to the description of the bail. He called himself "Yeoman," which he contended was not sufficient. He cited the case of *Fearnley's bail* (a), where the description "manufacturer" was held to be insufficient.

LITTLEDALE J.—The word "yeoman" is a recognised class in this country. But "manufacturer" is much too vague, there being so many classes of manufacturers, and of different commodities.

Bail passed.

(a) Ante, Vol. 1, p. 40.

TRINDER v. SMEDLEY.

MILLER shewed cause against a rule obtained by *Mansel* for setting aside an interlocutory judgment signed in this case. The facts were these:—The plaintiff declared on the 22nd of *July*, and, it being a town cause, his declaration was indorsed to plead in four days: on the 24th, the defendant obtained an order for a fortnight's time to plead. He did not, however, plead within that period, and, on the 7th of *August*, an order was made by consent, giving the defendant a month's further time to plead. The plaintiff signed judgment as for want of a plea on the 1st of *November*. On the 7th, he served the defendant with a rule to compute. Before it could be

If a defendant obtains an enlarged time for pleading previous to the 10th of *August*, but which does not expire on that day, he is entitled to the remainder of the enlarged time after the 24th of *October*, for the purpose of pleading.

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made absolute, the present rule *nisi* was obtained for the purpose of setting that judgment aside, on the ground that it had been signed too early, it being suggested that the defendant had as many days of the month's time granted to plead, after the 24th *October*, as remained unexpired on the 10th of *August*. That number being twenty-five, the judgment, it was said, had been signed seventeen days too soon. *Miller*, however, contended, that the plaintiff was by no means too early in signing judgment according to the practice of the Court. The case depended on the construction which the Court thought it right to put upon 12 *Reg. Gen. M. T. 3 Will. 4 (a)*. The words of that rule were, "that, in case the time for pleading to any declaration, or for answering any pleading, shall not have expired before the 10th day of *August* in any year, the party called upon to plead, reply, &c., shall have the same number of days for that purpose after the 24th of *October*, as if the declaration or preceding pleading had been delivered or filed on the 24th of *October*; but, in such cases it shall not be necessary to have a second rule to plead, reply, &c." That rule applied and was clearly intended to apply to cases where the time for pleading, according to the practice of the Court, had expired, and not to cases where time to plead had been enlarged by consent. The month given under the Judge's order, to which the plaintiff consented, must be considered as running out during the vacation after the 10th of *August*. Having run out during that period, the plaintiff was quite right in signing judgment at the time he did. He had, in fact, by the time he had given the defendant, delayed his proceedings much longer than was necessary, according to the practice of the Court. The present rule must, therefore, be discharged.

(a) Ante, Vol. 1, p. 474.

Mansel, in support of the rule, contended, that enlarged time to plead must be treated in the same manner as time originally allowed, according to the practice of the Court. If that were so, then twenty-five days' time for pleading still remained for the defendant, when the 24th of *October* arrived. That this was a correct construction of the rule was shewn by the decision of the Court in the case of *Wilson v. Bradstocke (a)*. The marginal note of that case was, "If the time for pleading does not expire until after the 10th of *August*, although it may be enlarged time, the defendant has still the same time for pleading as if the declaration had been filed or delivered on the 24th of *October*." From this case it was clear, that the defendant was entitled to twenty-five days' time to plead after the 24th of *October*. The plaintiff having signed judgment before the expiration of that time, it was too early, and therefore the judgment was irregular, and must be set aside.

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LITLEDALE, J.—I have consulted several of the other Judges, and, among the rest, Mr. Baron *Parke* and Mr. Justice *Patteson*, and we are all of opinion that the defendant was entitled to the twenty-five days' time to plead after the 24th of *October*, that being the number of days still remaining unexpired on the 10th of *August*, out of the month's time granted on the 7th of that month. The present rule for setting aside the judgment must be made absolute, but without costs.

Rule absolute, without costs.

(a) Ante, Vol. 2, p. 416.

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LANDENS v. SHEIL.

The Court will not quash a writ of *certiorari*, unless there is an admission, or something tantamount to it, by the party suing it out, that he has done it for the purpose of delay.

BUSBY applied for a rule to shew cause why the *certiorari* in this case should not be quashed, and a *procedendo* issued, on the ground that the former writ had been issued by the defendant for the purposes of delay and harassing the plaintiff. The affidavits on which he moved stated, that the writ had only been delivered to the Court on the day on which the trial was to take place, and that great expense would necessarily be caused to the parties if the trial were to take place in a superior jurisdiction. It was also suggested, that there was no difficulty in the question to be tried, and, therefore, that there was no reason in point of law or of convenience for preventing the inferior jurisdiction from entertaining the question.

W. H. Watson, contra, submitted, that the *certiorari* was a matter of right, if the party complied with the usual conditions required by the Court. There was no suggestion on the other side that those conditions had not been complied with, or that the proceedings on the part of the defendant were not perfectly regular.

Cur. adv. vult.

LITTLEDALE, J.—This was an application to quash a *certiorari* and issue a *procedendo*. The *certiorari* was directed to the mayor, &c., the Judges of the Borough Court of *Berwick*. The ground of the application was, that the *certiorari* was issued for the purpose of delaying the plaintiff, and that therefore it was an abuse of the process of the Court, which the Court would not allow, and would act as in cases of writs of error brought for delay. As applicable to this particular case, instances of *certiorari*, may be referred, namely, *Jones v. Davis* (a) and

(a) 1 B. & C. 143.

Stacey v. Evans (a); but those cases arose upon writs of *certiorari* granted to the Courts of Great Sessions in *Wales*; and it had been settled in *Zinck v. Langton* (b), and *Williams v. Thomas and Another*, in the note to that case, that the Court would not grant a *certiorari* to remove a cause out of the counties palatine, unless upon special cause, and under peculiar circumstances; and the same rule was held to apply to the Courts of Great Sessions. These cases, therefore, do not govern this; but must be determined by the general principles as to proceedings which have the effect of delaying parties. The *certiorari* is regular in point of form; and, as to the time when it was delivered to the Court below, I take it that every person is entitled to a *certiorari* as he is to a writ of error; and the Court will take care that its process shall not be used for improper purposes. Some years ago, writs of error were more frequent than of late years, and there is no doubt that many of those sued out were in fact for the purpose of delay; but yet the Courts would not quash or set them aside, or permit execution to be sued out, unless there was an admission of the party, or something tantamount to it, that they were issued for the purpose of delay. I think that it is reasonable that writs of *certiorari* should be governed by the same sort of general rules. In the present case, the purposes for which the writ is sued out are fully disclosed, and though it will in a certain degree tend to delay the plaintiff, yet, as the object of the writ is to enable the defendant to effect a general distribution of his effects, which the plaintiff will not accede to, I do not think it can be considered as an abuse of the process of the Court, and therefore the rule must be discharged, but not with costs.

Rule discharged, without costs.

(a) 13 Price, 449.

(b) Dougl. 749.

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HOWARD v. BRADBERRY.

If one of the bail below consents to time being given to the defendant to perfect bail above, his act is binding upon both.

PLATT shewed cause against a rule *nisi* to set aside the proceedings instituted by the plaintiff on the bail-bond, and to deliver it up to be cancelled. The ground of the application was, that time had been given by the plaintiff to the defendant to put in bail above, without the consent of the bail below. On this ground it was contended, that the bail below were discharged, and, therefore, that the bail-bond ought to be delivered up to be cancelled. He, however, produced affidavits on the part of the plaintiff, shewing that the bail had consented to the time being given to the defendant.

Kelly and *Knowles*, in support of the rule, contended that the affidavit produced on the part of the plaintiff did not sufficiently shew that both the bail had consented to time being given to the defendant. If that were so, and only one had consented for the time being given, it could not bind the other.

Cur. adv. vult.

LITLEDALE, J.—This was a rule to set aside the proceedings on a bail-bond, and to deliver it up to be cancelled. The ground of the application was, that time, *viz.* four successive months, had been given by the plaintiff to the defendant to put in special bail without the consent of the bail below, and that they were therefore discharged. The answer of the plaintiff is, that the bail consented to the time being given. On looking through the affidavits, I think it must be taken that time was given to put in bail, with the consent of one of the bail; for, though there is no distinct evidence of the first month being given, nor of the last month, yet his consenting to the intermediate months is sufficient to satisfy me that the whole time was given with his approbation, which amounts to an implied

consent. There does not seem sufficient to affect the other bail with a consent; but I think, in the case of bail, as to subjects of this kind, with respect to consent, one is to be considered as bound by the acts of another.

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Rule discharged.

METCALF v. PARRY (a).

(Before the four Judges.)

J. JERVIS shewed cause against a rule *nisi* obtained by *Humfrey*, on the part of the plaintiff, requiring the under-sheriff of *Warwickshire* to shew cause why he should not pay the costs consequent on the refusal by him to produce to the plaintiff his notes taken on the trial of an issue before him under the 3 & 4 Will. 4, c. 42, s. 17. It appeared from the affidavit in support of the action, that an application had been made to the Court above for a new trial, and the Court intimated a wish to have the notes before it, in order to determine on the propriety of granting a new trial. An application was accordingly made to the under-sheriff, by an agent of the plaintiff, for the notes. He, however, refused to produce them, without an official order from the Court requiring him to do so. The Court afterwards made such an order, and the notes were ultimately obtained. Previous to their being obtained, certain expenses, it was said, were incurred. The object of the present rule was to compel the under-sheriff to pay those expenses. He should, in the first instance, object to the application in point of principle. It was in fact requiring a Judge to produce his notes, and then, if from some cause which

If an under-sheriff withholds his notes taken on a writ of trial after the Court has required their production, he may be compelled to pay the expenses caused to the parties by their non-production; but he is not answerable for his agent's conduct in withholding them, unless it is shewn that the latter acted under his direction.

(a) See this case also reported ante, Vol. 2, p. 589. The rule was, without cause being shewn, but was afterwards re-opened. on that occasion, made absolute

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appeared sufficient to his mind he did not produce them, he was to be called upon to pay all the expenses consequent on his refusal. The Court surely would not grant such a motion against a Judge at *Nisi Prius*; and, if they would not, how could they against the under-sheriff, who was placed in the same position as such a Judge? But, if it should become necessary to go into the merits of the case, the affidavits on the part of the under-sheriff shewed that he was perfectly blameless. They stated that a person, who he had reason to believe was inimical to one of the parties, had come to him, stating that he was the agent of the plaintiff, and demanded the notes in question. Not conceiving him to be authorized to make the demand, that person was told that the notes would not be produced without an official intimation from the Court. When, however, such an intimation was received by him, he sent them to his agents in town, and by them they were ultimately produced. This, it was submitted, was a complete answer to the application.

Humfrey, in support of the rule, contended that the sheriff was merely an officer of the Court for certain purposes, and to perform certain acts under the authority of the Court. It had, therefore, full power to compel him to do all the acts necessary for the purpose of carrying its directions into effect. If the under-sheriff, who was the representative of the sheriff, misconducted himself, the Court had a right to punish him in such a way as in its discretion it would punish any other of its officers. The Court, therefore, had jurisdiction over the subject of the present application. Next it was evident that the under-sheriff must be considered as connected with his agents in town, and they must be regarded as acting under his authority. Considerable delay had occurred in producing the notes, even after the time when the under-sheriff's own affidavit stated them to have been delivered

to the agents. For that delay, as well as his own in originally refusing to deliver his notes to the plaintiff's agent, he was answerable. That delay had been productive of expense to the plaintiff, and that expense, therefore, the under-sheriff ought to pay.

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LORD DENMAN, C. J.—It appears to me, from the affidavits in answer to the application, that the under-sheriff cannot be considered as having misconducted himself in such a way as to authorize the Court in making him pay the costs or expenses.

TAUNTON, J.—If it could be made appear that the delay which subsequently took place in the agent's office after the notes had been sent up in consequence of an intimation of the Court, was the result of directions from the under-sheriff, then I think he ought to have been compelled to pay these expenses.

PATTESON, J.—It appears to me that the under-sheriff can hardly be considered as blameable in having withheld his notes from the person who first demanded them, if he supposed that that person was inimical to either of the parties. Besides, it does not appear that at the time of the first application being made, he was aware that the Court itself had required the notes to be produced.

WILLIAMS, J., concurred.

Rule discharged, without costs.

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An action for the use and occupation of "furnished" lodgings is within section 13 of the 39 & 40 Geo. 3, c. 104, the (*London Court of Requests' Act*), and therefore it may be brought in the superior Courts without the plaintiff's incurring the penalties provided in section 12 (a).

W*ALSH* shewed cause against a rule *nisi* obtained by *Mansel* for depriving the plaintiff of his costs, he not having recovered to the amount of 5*l.* on a cause of action for which the defendant might have been sued in the *London Court of Requests*. The application was founded on the 39 & 40 Geo. 3, c. 104, s. 12. The action was brought for the use and occupation of certain furnished apartments, and the plaintiff only recovered a verdict to the amount of 2*l.* 10*s.* The action was, therefore, for rent, and such actions were specially excepted from the jurisdiction of the *London Court of Requests* by section 13 of the above act, which constituted the Court. The words of that section were, "Provided always, that nothing herein contained shall extend, or be construed to extend, to prevent or restrain any person or persons from making distress or bringing any action or actions whatsoever for rent, and thereby recovering such rent with costs, although the same rent should not exceed the sum of 5*l.*" That such an action was not within the compulsory jurisdiction of the Court had been held in *Holden v. Newman* (b). There, after an action had been brought in the *King's Bench* for board and lodging of the defendant's wife in *Middlesex*, which was referred to an arbitrator, who awarded less than 5*l.*, which was for the rent of the lodging, the Court held that this came within section 13 of this act. Again, in *Drew v. Fletcher* (c), where an action for money had and received was brought against the receiver of an estate to recover money received by him for rent, in order to try the title of the estate, the Court held it to be an action for rent within the meaning of the 39 & 40 Geo. 3, c. 104, s. 13. There, the Court said, "this is in substance an action for

(a) See ante, p. 85.

(b) 13 East, 161.

(c) 1 B. & C. 233.

rent. The plaintiff could not have recovered without proving his title to the rent of the premises in respect of which the defendant received the money. It is, therefore, within the meaning of the 13th section." There, the principle of the former case was carried much further than was necessary, in order to shew that the present application could not be granted.

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Mansel, *contra*, distinguished the present case from those which had been cited, by referring to the terms of the declaration, which alleged that the defendant was "indebted to the plaintiff in the sum of 10*l.*, for the use and occupation of certain furnished lodgings." The case of *Holden v. Newman* only shewed that an action for "rent," in the ordinary sense of the word, which must mean what was paid for the use of the premises independent of the use of what was contained in them, was not within the act. That of *Drew v. Fletcher* was decided on the same principle. But here the action could not be considered as for rent, in the sense to which he alluded, but was brought principally for the use of the furniture. The value of the lodgings without the furniture would be comparatively inconsiderable. It was also clear that the plaintiff considered the use of the furniture as the main ground of action, inasmuch as he had left the allegation "furnished" in his declaration. He would certainly not have done so if he had not sought to recover something beyond the mere rent of the lodgings. It must, therefore, be presumed that the use of the furniture was the material cause of action, and the rent a mere accident. Under those circumstances, the case could not be considered as coming within the meaning of section 13 of the *London Court of Requests' Act*. Besides, acts of this sort were not to be construed too rigorously when a question was raised as to their jurisdiction, with respect to the amount of the cause of action. The object of the act was to give parties a cheap and speedy

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remedy for small claims, and therefore it was inconsistent with that object to put a strained construction on a clause, the object of which was to oust the jurisdiction of the Court.

WILLIAMS, J.—If this case had come before me without the decisions which have been cited, I should think that there was no pretence for the application. But those decisions appear to me to have gone even further than the present case requires. By comparing the facts of this case with that of *Drew v. Fletcher*, I think there is much greater ground for deciding that the action was brought for rent than in that case. Can I say, that, because there is something superadded to the rent, as for instance furniture, that, therefore, it is not within the meaning of this section? It appears to me, that this case is protected by the proviso. The rule must therefore be discharged, but I say nothing about the costs. They will, consequently, be costs in the cause.

Rule discharged.

Re Arbitration of PERRING and KEYMER.

Where, from the misconduct of one of the parties to an award, the submission cannot be made a rule of Court, so as to enable the opposite party to make it a rule of Court before the last day but one of the first term after the award, the time for a motion to set it aside will be enlarged until the following term.

FOLLETT moved to set aside an award under the 9 & 10 Will. 3, c. 15, on the last day but one of the term. The difficulty under which he was placed was, that the submission had not been made a rule of Court. The reason of its not having been made a rule was, that the successful party had obtained possession of it, and would not make it a rule of Court, in order that the first term after the award was made might pass by, and then no opportunity would remain for moving to set it aside. Several efforts had been made to obtain possession of the submission in order to make it a rule of Court, but without effect. Under these circumstances the Court would interfere, by allowing further time to move to set aside the award, as it

would be impossible to make it a rule of Court during the present term, and also apply to set it aside.

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WILLIAMS, J. (after conferring with the Clerk of the Rules, Mr. *Wood*).—You may make your motion next term, and, if a rule *nisi* is granted, it will be dated as of this term.

Leave accordingly.

STAINLAND and Another *v.* — OGLE.

HANCE applied to make a Judge's order for returning a writ a rule of Court, and also for an attachment for disobedience to it. He proposed to make but one motion for both purposes, as had been permitted in several cases in the Court of *Exchequer* (a).

A Judge's order for returning a writ cannot, in the *K.B.*, be made a rule of Court, and an attachment for disobedience thereto obtained on one motion.

LITLEDALE, J.—It has always been usual to make two separate distinct motions, and I am not aware of any alteration in the practice of this Court in that respect. Inquiry, however, had better be made of the Clerk of the Rules as to the present course of proceeding.

Inquiry was afterwards made, and that officer certified that the practice of this Court remained unaltered, and two motions were consequently still necessary.

Rule accordingly.

(a) The following is a manuscript note of the cases in question, with which the reporter has been favoured:—

HOWELL *v.* BULTEEL.

Comyn moved to make a Judge's order, made in vacation, to bring in the body, a rule of Court, pursuant to *Reg. Gen. H. T. 3 Will. 4*, (*ante*, Vol. 1, p. 731). He also moved for an attachment against the

One motion is sufficient to make a Judge's order to bring in the body, or to re-

turn a writ, a rule of Court, and for an attachment for disobedience to it.

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sheriff for disobedience to the order, submitting to the Court whether it was necessary to make two separate and distinct motions.

LORD LYNTHURST, C. B.—The rule says, that, in case the sheriff shall not duly obey the order, and it shall have been made a rule of Court, an attachment shall issue “forthwith.” The good sense, therefore, is, that the application to make the order a rule of Court, and for the attachment, should be one motion.

BAYLEY, B.—An unnecessary expense, which it is a great object to prevent, would be incurred by requiring two distinct motions.

Rule granted.

THE same day, *Erle* made a similar motion for not obeying a Judge’s order to return a writ of *fiery fucias*, pursuant to rule 13 *M. T. 3 Will. 4*, (*ante*, Vol. 1, p. 474), and throughout the term the same course of practice was pursued.

SMITH v. COLLIER.

If a rule is drawn up to shew cause in one term, it cannot be made absolute in the next term without enlarging; but it may be revived.

PLATT moved to make a rule absolute on the last day but one of term. The difficulty was, that the rule had been drawn up to shew cause in the previous term, but cause was not shewn against it, nor was it enlarged.

WILLIAMS, J. (after referring to the Clerk of the Rules, *Mr. Wood*).—You are too late to make the rule absolute now, it having been drawn up to shew cause in the last term. You may, however, now move to revive it, to shew cause on the first day of next term, or to-morrow, if you can serve the revived rule before nine o’clock to-night.

Rule accordingly.

COURT OF COMMON PLEAS,

Michaelmas Term,

IN THE FIFTH YEAR OF THE REIGN OF WILLIAM IV.

SHIRLEY v. JACOBS.

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MILLER obtained a rule *nisi*, calling upon the defendant to shew cause why an order made by Lord *Denman* at chambers, on the 3rd of *October*, directing the bail-bond to be delivered up to be cancelled, on entering a common appearance, and the costs to be paid by the plaintiff, on the ground of irregularity in the process, should not be rescinded. The alleged irregularity was, that, in the indorsement on the copy of the writ of *capias*, it was stated that further proceedings would be stayed on payment of the debt and costs, "within four days from the execution hereof," while the word used in 2 *Reg. Gen. H. T. 2 Will. 4*, was "service," and not "execution."

An indorsement on a writ of *capias*, which does not strictly follow the form given in 2 *Reg. Gen. H. T. 2 Will. 4*, must at least be amended.

If an affidavit, made in support of an application to set aside a Judge's order, state the substance of that order, it is sufficient.

The date of bills of exchange need not be stated in an affidavit to hold to bail, if it appear in the affidavit that the day of payment of the bills is passed.

Mansel appeared to shew cause, and took a preliminary objection to the plaintiff's affidavit neither setting forth nor having attached to it an office copy of the Lord Chief Justice's order.

TINDAL, C. J.—It states the substance of the order, which is enough. The Court is of opinion that the plaintiff should amend and pay costs, but we shall hear him in support of his rule. The point has been much discussed between the Judges, but it is still open to argument.

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Miller, in support of the rule, said, that, as the result of the consideration the Judges had given the question had not yet been promulgated, his client's case should be considered independently of it. The rule of Court, giving the form in question, was made before the passing of the Uniformity of Process Act, and was to be considered with reference to the then practice. All bailable process was executed and not served, so that "execution," and not "service," was the proper word to use in the indorsement on the *capias*. A form suggested in the rule of Court was not to be followed literally in every case, whether applicable or not. The form spoke of the plaintiff or "his attorney;" but was it therefore to be contended that where the plaintiff was a woman it might not be changed to "her attorney?"

TINDAL, C. J.—Or, if there were several plaintiffs, to "their?"

Miller.—Precisely so. By parity of reasoning in this case, the word "execution" had been properly substituted for "service;" and more especially so was it justified when the Court came to look into the body of the writ, where the word "execution" was used several times. Suppose this act had never been passed, and that bailable process was executed upon a defendant, what information would he have as to whence the four days were to run if the word "service" were used, since, in point of fact, it had not been served at all? It would be hard upon the plaintiff to have to pay costs for using the word which the practice heretofore required, which was undeniably the best word, and with respect to the use of which the Judges had themselves differed.

TINDAL, C. J.—There certainly was a difference of opinion among the Judges. Several cases of this kind came before me, and I thought the word "execution" was

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rightly used; but other Judges thought the rules of the Court ought to be more strictly adhered to. The point was discussed among us in order that an uniform understanding might be come to, and it was ultimately considered that non-compliance with a rule of ours ought not to be visited with the same consequences as non-compliance with an act of Parliament; but that a person, who had not observed so plain a rule, should be called upon to amend, on payment of costs, and proceedings be stayed until four days after the amendment made.

Miller.—Lord *Denman's* rule, which we seek to rescind, is, I submit, too severe, for it visits the party with costs.

TINDAL, C. J.—We think the learned Judge has gone rather too far; and the rule the Court pronounces is, that the order of Lord *Denman* be rescinded, the plaintiff being at liberty to amend the indorsement on the writ on paying the costs of such amendment, and of this application.

Miller begged to be allowed two days' time to ascertain from his client whether he would accept the rule upon the conditions imposed, which the Court granted.

Before this order was finally pronounced,

Mansel took an objection to the affidavit to hold to bail, because it did not state the date of the bill of exchange on which the action was brought, but

THE COURT said it was now clearly settled not to be necessary to state the date of bills of exchange in affidavits of debt, if it appeared in the affidavits that the time of payment was passed. It did so appear in the affidavit of the plaintiff.

Rule accordingly.

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FORBES v. MASON.

The omission of immaterial particles in the writ of *capias* is not an irregularity of which the Court will take notice, if the omissions do not alter the meaning of the writ.

R. V. RICHARDS moved for a rule, calling upon the plaintiff to shew cause why the defendant should not be discharged out of custody on entering a common appearance, on the ground of an irregularity in the writ of *capias*. The fourth section of the Uniformity of Process Act directs, that the writ of *capias* shall be according to a form given in the schedule annexed to the act. In this form, the writ towards its close directs the sheriff to return it, if unexecuted, "at the expiration of four calendar months from *the* date hereof, or sooner, if you shall be thereto required by order of the said Court, or *by* any Judge thereof." The irregularity complained of was, that, in the copy of the writ served on the defendant, the word "the" before "date" was omitted; and also the word "by" before "any Judge." As this was a form given in the schedule of an act of Parliament, the Court would see that it was not strictly adhered to. Great laxity of practice might be introduced if such omissions were passed over.

TINDAL, C. J.—The meaning of the writ is not altered by these omissions, and we shall not apprehend any laxity of practice arising from this being passed over.

R. V. Richards.—But my objection is, that it is not a copy of the writ that we have been served with.

VAUGHAN, J.—Nor would it be if the cross to the "t" of the "the" were omitted. Can ingenuity suggest a variance in the meaning?

The rest of the Court concurring—

Rule refused (a).

(a) See *Hodgkinson v. Hodgkinson*, ante, Vol. 2, p. 635; *Street v. Carter*, ante, Vol. 2, p. 671; and *Barker v. Weedon*, ante, Vol. 2, p. 707.

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ROY v. CHAMPNEYS.

SIR GREGORY LEWIN moved the Court for an order upon the Secondary to enter a special case for argument, although it had not the signature of counsel as required by the rules and practice of the Court. The circumstances, under which he made the application were these:—The Vice-Chancellor had directed the opinion of the Court to be taken on a special case, and had provided in his order, that, if counsel could not agree upon the case, it should be referred to the Master to settle. Counsel had not been able to agree upon a case, and a Master in Chancery had, in pursuance of the Vice-Chancellor's order, settled it; but counsel had refused to sign it. The consequence was, that the officer of this Court had refused to enter it for argument, and the order he now sought was to obviate the difficulty thus raised.

Where the Vice-Chancellor directed the opinion of the Court to be taken on a special case, the Court would not permit it to be entered for argument with the signature of a Master in Chancery, who had settled it, instead of the signature of counsel; but this Court will not compel an attorney to lay the case before counsel for the purpose of signature.

TINDAL, C. J.—It cannot be argued unless signed by counsel on both sides.

Sir Gregory Lewin.—It had the signature of the Master, and that makes the case complete, the Vice-Chancellor having provided against the contingency of counsel not being able to agree. The reasons which had prevented counsel agreeing upon a case also prevented their signing that which was settled by the Master.

TINDAL, C. J.—The Master is no officer of ours, and the signature of counsel is a form we require, not as expressing their individual agreement in the facts to which they put their names, but as binding them in their argument not to travel out of those facts.

The rest of the Court concurring—

Order refused.

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CHAMFNEYS.

ON a subsequent day, Sir *Gregory Lewin* again mentioned the case, and said that the difficulty now was not with counsel, but with the attorney on the opposite side, who would not lay the case before counsel for signature.

THE COURT said, it could not interfere. The party must go to the Vice-Chancellor for the cure of any obstinacy or contempt that prevented the execution of his order.

ROGERS v. GODBOLD.

Semble, that if in an affidavit of debt for principal and interest, a sum and date are mentioned, from which interest can be computed, it is not essential that the amount of interest claimed should be specifically mentioned (a).

WILDE, Serjt., moved for a rule calling upon the plaintiff to shew cause why the bail-bond should not be delivered up to be cancelled, on the ground of a defect in the affidavit to hold to bail. It was on a bill of exchange, and the sum claimed was 37*l.* for "debt and interest," without stating the amount due for interest.

TINDAL, C. J.—The point is still open for discussion; but the Judges have met in Chambers and expressed this opinion, that where a claim is made for principal and interest, and a sum and date are mentioned, from which interest can be computed, it is sufficient.

The case was ultimately disposed of, on the ground that the affidavit did not anywhere mention the amount of the bill.

(a) See *Callum v. Leeson*, ante, Vol. 2, p. 381.

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ANDERSON and Another v. JONATHAN BAKER.

ANDREWS, Serjt., moved to make a rule to compute absolute. The motion would be one of course were it not for an omission in his affidavit of service. The affidavit did not give the Christian name of the plaintiff as well as the defendant. In this respect it had followed the rule which had not given it either, and the service had been correct. The question was, whether, under these circumstances, the omission was fatal? The parties resided at *Bath*, and it would be a great expense to be compelled to amend the affidavit.

In intitling an affidavit of service of a rule to compute, the Christian name of the plaintiff as well as of the defendant must be introduced.

GASELEE, J. (having consulted the Prothonotary) said, that the affidavit must be amended. It was a question whether it would at present sustain an indictment for perjury.

Andrews, Serjt., took nothing by his motion.

 QUELLY v. BOUCHER.

THIS was an action brought by an executor in his representative character on a bill of exchange for 20*l.*, which had been indorsed to the testator, an attorney, for the purpose of getting it discounted. He died before the bill became due, and it being found in his pocket the plaintiff brought the present action. A verdict was found for the defendant. The action was commenced before the 3 & 4 *Will. 4*, c. 42, came into operation, but the verdict was after. The 31st section enacts, "That in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall, *unless the Court in which such action is brought, or a Judge of any of the said superior Courts, shall otherwise*

Affidavits sworn in opposition to to one rule, on which the allegations in them may be immaterial, cannot be used without re-swearing, in opposition to another rule, on which they may become material, although the same question might be intended to be raised on the first rule, which was actually raised on the second.

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order, be liable to pay costs to the defendant in case of being nonsuited, or a verdict passing against the plaintiff, and in all other cases in which he would be liable if such plaintiff were suing in his own right upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner." The plaintiff applied to the Court under this section of the act for a rule calling upon the defendant to shew cause why judgment should not be entered up without costs, or, if the defendant would not consent thereto, why the verdict should not be set aside, and a new trial had. The defendant refused to have judgment entered up without costs; and the Court decided, that, under the terms of the rule, it had no power to enter upon that question. The other alternative was not pressed. The plaintiff next obtained a rule calling upon the defendant to shew cause simply why the judgment should not be entered up in the cause without costs.

Andrews, Serjt., now opposed this rule, and began to read affidavits which had been filed by the defendant for the purpose of opposing the former rule.

Wilde, Serjt., objected to his doing so, on the ground that perjury could not be assigned on them.

VAUGHAN, J.—These affidavits are filed, and you can make use of them; why cannot the defendant?

Wilde, Serjt.—That which a party does is always evidence against him, but it is not always evidence for him. Perjury could not be assigned on any part of these affidavits which relates to matter not material to the cause in which they were made. But matter which was immaterial to the former rule may be very material to that now under

discussion; and however material it may be to this rule, and however false, the party could not be punished for his perjury, because, in an indictment for perjury, it must be averred, that the matter charged to be false was material with reference to the point before the Court when it was sworn to.

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Andrews, Serjt.—These affidavits are filed with the Court, and I have often known such affidavits made use of. The rule with respect to which they were sworn called upon the defendant to shew cause why judgment *should not be entered up without costs*, or, if the defendant would not consent thereto, why the verdict should not be set aside and a new trial had. The affidavits I wish to make use of relate to the first part of this rule, which is in the precise terms of the rule now under discussion.

Wilde, Serjt., in reply.—The last rule was in substance a rule for a new trial, with a proviso, that, if the defendant would do a particular thing, the new trial would not be asked for. The Court decided, it had not then power to hear arguments upon the point which was then wished to be determined, and now we come for another rule, which differs in substance from the last rule. It is clear, therefore, that the affidavits made in opposition to the last rule may contain matter immaterial then, but material now, yet upon which we could not assign perjury.

TINDAL, C. J.—Looking at the first rule, it appears in its form to have embraced two subject matters, the judgment being entered for the defendant without costs, and the granting a new trial; but, by the mode in which the alternative is put, if the defendant will not consent to the first proposition the Court has lost all jurisdiction over it.

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I feel considerable doubt, therefore, whether the affidavits made by the defendant, under these circumstances, could have perjury assigned upon them with reference to matters relating to a new rule, the point of which was not before the Court when they were sworn. The safer course, then, will be to have the affidavits resworn.

The rest of the Court concurred.

LAPORTE'S Bail.

Although bail are unopposed, the Court will not allow them to justify if it has been satisfied in a previous case that they are unfit.

BAIL appeared to justify in three actions brought against the defendant. In the first case called on they were opposed, and, it appearing that they could not swear that their liabilities in certain other actions in which they had been bail for the same defendant had ceased, the Court would not allow them to pass, but granted the defendant time to make affidavit of the fact on paying the costs of the day. They were also opposed in the second action, and the same indulgence was extended to the defendant upon the same terms. In the third case there was no opposition, and

Heaton urged that they should, in that case, be allowed. It was the uniform practice, when bail were unopposed and swore that they were worth the amount required by the practice of the Court, to allow them to justify.

VAUGHAN, J. (a)—But the Court will take judicial notice of an unfitness of which it has had auricular demonstration. It cannot be pretended, that, if the bail now offered had been rejected, on being opposed in the first two cases, that it would not have been competent for the

(a) Sitting alone.

Court to reject them in this case, although unopposed. As far as their own account goes, they are unfit to be admitted as bail, and I shall certainly not allow them to justify; but you may have the same indulgence in this case as in the two others.

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LAFORTE'S
Bail.

Two days' time was granted to the defendant to prepare his affidavit.

BRADLEY v. BAILEY.

HARRISON had obtained a rule calling upon the defendant to shew cause why the *ca. sa.* should not be amended. The action had been brought for 33*l.* 8*s.*, and judgment had been signed for 38*l.* 14*s.*, that being the amount of the debt, interest, and costs. By some inadvertency, however, the clerk who had the management of the cause, in filling up the *capias ad satisfaciendum*, inserted in the body of the writ the damages laid in the declaration, viz. 40*l.* It was to correct this mistake that the application was made.

Where bail would be fixed by an indulgence granted by the Court, such terms will be imposed upon the plaintiff as will give the bail an opportunity of freeing himself from his liability.

R. V. Richards shewed cause against the rule.—His affidavits shewed that the plaintiff had commenced actions against both the bail: one of them had been discharged from his liability by time having been given to the defendant; but the other bail, not being aware of this laches, had taken a step in the cause, which precluded him from afterwards availing himself of it. The present application was in reality made to fix the last-mentioned bail; but he trusted to the equity of the Court for imposing such terms upon the plaintiff, besides the payment of costs, as would prevent the bail from suffering.

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BRADLEY

v.

BAILEY.

Harrison said, that he must of course submit to such terms as the Court might think he reasonably ought.

Per Curiam.—You may amend upon paying the costs of the action against the bail, and giving him a week to render the defendant.

Coram TINDAL, C. J., GASELEE, J., BOSANQUET, J., and VAUGHAN, J.

In re SARAH LUKE, an Infant, Wife of GEORGE LUKE.

Where the form of certificate to be made by commissioners for taking the acknowledgments of married women to deeds prescribed by the 84th section of the 3 & 4 Will. 4, c. 74, did not suit the peculiar circumstances of the case, the Court of *Common Pleas* will make a special order for the alteration of the form in that case.

ADAMS, Serjt., applied for an order upon certain commissioners, appointed under the 3 & 4 Will. 4, c. 74, for taking the acknowledgement of married women to deeds, for the purpose of obviating a difficulty arising from the special circumstances of the present case. By the 11 Geo. 4 & 1 Will. 4, c. 60, s. 6, it is enacted, "that, where any person seised or possessed of any land upon any trust, or by way of mortgage, shall be under the age of twenty-one years, it shall be lawful for such infant, by the direction of the Court of *Chancery*, to convey the same to such person, and in such manner, as the said Court shall think proper; and every such conveyance shall be as effectual as if the infant trustee or mortgagee had been at the time of making and executing the same of the age of twenty-one years." The next section gives the same powers to the Court of *Chancery* of the County Palatine of *Lancaster* as to land within its jurisdiction. The Court of *Chancery* of *Lancaster*, in the exercise of the authority thus given, ordered two young ladies, who were infant trustees, to convey to certain other trustees named by the Court. One of them before the conveyance was made, at the age of seventeen, married a Mr. *Luke*. When before commissioners for taking her acknowledgment, pursuant

to the 3 & 4 *Will.* 4, c. 74, s. 84, one of them observing her youthful appearance inquired her age. On learning it, the commissioners refused to take her acknowledgment, because they are bound by the 3 & 4 *Will.* 4, c. 74, to certify that a married woman coming before them to acknowledge a deed is at the time "of full age and competent understanding." The objection of the commissioners was well founded, for they have no power to do otherwise than is prescribed by the act; but the same section which gives the form of the certificate also gives the Court of *Common Pleas* at *Westminster* authority to alter it (a).

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In re
SARAH LUKE.

(a) The 84th sect. of the act is as follows, "And be it further enacted, that when a married woman shall acknowledge any such deed as aforesaid, the Judge, Master in Chancery, or Commissioners taking such acknowledgment, shall sign a memorandum to be indorsed on or written at the foot, or in the margin of such deed; which memorandum, subject to any alteration which may from time to time be directed by the Court of Common Pleas, shall be to the following effect; videlicet, 'this deed marked, [*here add some letter or other mark for the purpose of identification*], was this day produced before me, [*or us*], and acknowledged by — therein named to be her act and deed; previous to which acknowledgment the said — was examined by me [*or us*] separately and apart from her husband, touching her knowledge of the contents of the said deed and her consent thereto, and declared the same to be freely and voluntarily executed by her.'

And the same Judge, Master in Chancery, or Commissioners, shall also sign a certificate of the taking of such acknowledgment, to be written or ingrossed on a separate piece of parchment; which certificate, subject to any alteration which may from time to time be directed by the Court of Common Pleas, shall be to the following effect, videlicet,

'These are to certify, that on the — day of —, in the year one thousand eight hundred and —, before me the undersigned Sir Nicholas Conyngham Tindal, Lord Chief Justice of the Court of Common Pleas at Westminster, [*or before me, Sir James Parke, knight, one of the Justices of the Court of King's Bench at Westminster; or, before me, the undersigned James William Farrer, one of the Masters in ordinary of the Court of Chancery; or, before us, A. B. and C. D., two of the perpetual commissioners appointed for the — for taking the acknowledgments of deeds by mar-*

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 In re
 SARAH LUKE.

Under these circumstances the question was, whether the Court should make a general rule to apply to all cases, or an order to meet the exigency of this particular instance.

TINDAL, C. J.—Is it certain that *Sarah Luke* is an infant trustee, and has been ordered by the Court of *Chancery of Lancaster* to make the conveyance?

Adams, Serjt., said his affidavits disclosed full proof of all those facts.

TINDAL, C. J.—It appears to me, that the better course will be to make the change in the form of the certificate in our order relative to this case alone, rather than to make it in the general form of the certificate. You may, therefore, take an order for the commissioners to omit the words, “full age and,” in their certificate in this case.

Order accordingly.

ried women, pursuant to an act passed in the — year of the reign of his Majesty King William the Fourth, intituled An Act [*insert the title of this act*]; or, before us, the undersigned A. B. and C. D., two of the commissioners specially appointed pursuant to an act passed in the — year of the reign of his Majesty King William the Fourth, intituled An Act [*insert the title of this act*], for taking the acknowledgment of any deed by — the wife of —, appeared personally — the wife of —, and produced a certain indenture marked

[*here add the mark*], bearing date the — day of —, and made between [*insert the names of the parties*], and acknowledged the same to be her act and deed. And I [*or we*] do hereby certify, that the said — was, at the time of her acknowledging the said deed, of full age and competent understanding, and that she was examined by me [*or us*] apart from her husband, touching her knowledge of the contents of the said deed, and that she freely and voluntarily consented to the same.”

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CARNE v. NICOLL.

THIS was a writ of right, which had been appointed to be tried at bar. Four knights having been returned by the sheriff, they appeared, and were sworn. Having elected the grand assize, the trial of the cause was adjourned till the eleventh of *November*. On that day certain of the knights and recognitors appeared in Court; but when the third knight was called, he did not answer to his name. The proper officer proved that he had left the summons at the knight's house.

Where a knight summoned to try a writ of right did not appear, the Court was willing to allow the parties in the cause to have it tried with three knights only, on their agreeing to waive the error which would appear on the record.

TINDAL, C. J., said, that, under these circumstances, the trial could not proceed, the law requiring four knights to be on the jury with the twelve recognitors summoned by them.

Semble, that when one knight has made default, the Court will not proceed to call over the names of the rest of the grand assize.

Wilde, Serjt., and *Barstow*, counsel for the tenant, offered to consent to proceed with three knights only, if the demandant would agree.

The Court will not hear counsel for a juryman who has been fined for contempt.

Merewether, Serjt., said that the trial would in that case be founded in error.

Wilde, Serjt., was willing, for his part, to take the consequences, whatever they might be, of entering into the proposed arrangement.

The Judges having consulted together—

TINDAL, C. J.—You mean, that, although error would appear on the record, the agreement between you should operate as an undertaking to waive the error?

Wilde, Serjt.—Precisely so, my Lord.

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TINDAL, C. J.—We are willing to give you every assistance in our power, and will not object to the arrangement if the demandant is willing to agree to it.

Merewether, Serjt., could not, under the peculiar circumstances of his case, consent to the arrangement proposed.

The knight, who had not answered to his name, was fined 50*l.*; the fourth knight was not called, nor were any of the grand assize.

The case was then adjourned till *Monday*, 17th *November*, on which day it was further adjourned; but—

Robinson stated, that he appeared on behalf of the knight who had been fined, and who was abroad.

TINDAL, C. J.—It is not the practice for the Court to hear counsel on behalf of persons it has fined. If you have any affidavit stating circumstances in extenuation of his conduct, we will consider it.

Coram TINDAL, C. J., GASELEE, J., BOSANQUET, J., and VAUGHAN, J.



SYWOOD and DOGHERTY's Bail.

The Court will not permit an irregularity to pass uncorrected if brought under its notice, although the opposite party appears by his silence to have waived it.

ARCHBOLD, in support of the bail, stated that in this case there was an irregularity in the notice, it not stating the various residences of the bail during the last six months, but he suggested that the plaintiff had waived the irregularity by not making the objection at the time of justifying.

In *Brigg v. Dick* (a), it was held that the want of a description of bail was cured by the plaintiff's excepting to them. Now this case was much stronger, for the plaintiff did not oppose the justification.

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STWOOD
and
DOUGHERTY'S
Bail.

TINDAL, C. J.—But when non-compliance with a rule of Court is brought to our notice, must we not interfere? You may have four days to amend your notice of justification, all proceedings being stayed in the meantime.

GASELEE, J., VAUGHAN, J., and BOSANQUET, J., concurred.

Rule accordingly (b).

(a) 1 Taunt. 17.

(b) See *Baxter's Bail*, 6 Moore, 44.

MORGAN v. BAYLISS and Wife.

E. v. WILLIAMS obtained a rule calling upon the plaintiff to shew cause why the bail-bond should not be delivered up to be cancelled, on the ground of a defect in the affidavit of debt. The affidavit was for goods sold and delivered to the wife, not saying whether before or after marriage. He cited *Wade and Wife v. Wade* (a), which was the converse of this case, but in which the same principle was involved.

Seemle, that where costs have been incurred by the delay of the defendant in objecting to a defect in the affidavit of debt, the Court will not order the bail-bond to be delivered up to be cancelled, although the defect be in some degree one in substance and not in form.

Andrews, Serjt., shewed cause against the rule.—The arrest had taken place so long ago as the 5th September; bail was put in on the 8th, and it was excepted to on the 27th. It was not till his bail was rejected that the defendant took this objection to the affidavit of debt, and he

(a) 4 Bing. 50.

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MORGAN
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submitted that a party could not take advantage of an irregularity in the process after taking a step in the cause. *Downes v. Witherington* (a).

TINDAL, C. J.—The answer on the other side will be that they do not want to set aside the proceedings for irregularity, but that they have been arrested on an affidavit absolutely void.

Andrews, Serjt.—The affidavit was certainly not quite regular, because it did not plainly appear to whom the goods were delivered; but the affidavit was substantially of a debt due from the defendant and his wife for goods delivered to her. It was, therefore, in the discretion of the Court to say, whether, in accordance with all the authorities, the defendant could complain of the affidavit of debt after having taken other steps. He also cited *Mammatt v. Mathew* (b).

E. V. Williams, in support of the rule, would not dispute the authorities referred to by the learned Serjeant, for no doubt a mere irregularity would be cured by the party taking a step in the cause. But he sought to set aside the bail-bond, because there was no authority for suing out the writ, and no default of the defendant could supply the want of authority. The law required certain particulars to be included in an affidavit of debt, in order to warrant the defendant being arrested, and the requisites of the law had not in this case been complied with.

TINDAL, C. J.—But how long are you to ponder over a defect in process, by not objecting before you have occasioned the expense of having your bail opposed? The

(a) 2 Taunt. 243.

(b) Ante, Vol. 2, p. 797.

case of *D'Argent v. Vivant* (a), recognised in this Court in *Showman v. Whalley* (b), is closely in point against you.

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E. V. Williams.—There the objection was one in point of form; but in this case the objection was substantial, for the defect in the affidavit was such that it came to the same thing as if there had been no affidavit at all.

TINDAL, C. J.—The affidavit in this case states positively that the party was indebted to the plaintiff.

E. V. Williams.—The distinction he now takes between an irregularity in point of form and a defect in substance, was recognised in *Tidd* (c).

VAUGHAN, J.—But you have occasioned an accumulation of costs by your delay in taking the objection, which ought to have been prevented.

E. V. Williams.—Perhaps to get rid of the objection the plaintiff will give us time to justify bail.

Andrews, Serjt.—As I am at present entitled to look to the sheriff, I would rather not agree to that proposition; but if the Court thinks it right for me to adopt it I will. The defendant must, however, put in good bail, pay the costs of the application, and also of our former opposition to bail.

TINDAL, C. J.—I think that a reasonable offer, and the defendant ought to be satisfied with it.

(a) 1 East, 330.

(b) 6 Taunt. 185.

(c) 1 Tidd. 188, ed. 9.

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GASELEE, J., VAUGHAN, J., and BOSANQUET, J., concurred.

Rule accordingly.

M'ANDREW v. ADAMS.

Where a rule *nisi* is obtained to reduce the plaintiff's damages, or set the verdict aside, the plaintiff is not entitled to the costs of opposing the rule as costs in the cause, although he succeeds upon one of the alternatives offered by the rule, unless he gives notice to the opposite party of his intention to abandon the other.

IN this case the defendant had obtained a rule calling on the plaintiff to shew cause why the verdict in his favour should not be set aside, and a nonsuit entered, or why the damages should not be reduced. When the rule came on for argument the plaintiff did not contest the point respecting the reduction of the damages, but that respecting the nonsuit only. The Court refused to set aside the verdict, but reduced the damages. No order was made with respect to the costs of the application, and the Prothonotary refused to allow them to the plaintiff as costs in the cause.

W. H. Watson obtained a rule *nisi* calling upon the defendant to shew cause why the Prothonotary should not review his taxation.

Wilde, Serjt., shewed cause.—The question had really been decided against the plaintiff, and he was not entitled to costs. It was true, that, on one of the alternatives of the defendant's rule, the decision of the Court had been in the plaintiff's favour; but that would not entitle him to have this rule made absolute. He cited the case of *Spitta v. Woodman* (a). The marginal note to that case was in these terms: "If the plaintiff recovers a verdict for loss on a policy, and endeavours, on a rule *nisi* being obtained for

(a) 3 Taunt. 406.

a nonsuit, to support his verdict to the extent, although he be held entitled to a return of premium, he is not entitled to the costs of the rule, nor to any costs except of the count for money had and received, and of such parts of the brief and evidence as apply thereto." That case cannot be distinguished from the present. Mr. Justice *Lawrence*, in giving his judgment, said, "The plaintiff did not confine his resistance to the rule to a mere assertion of his claim to recover the premium. He was squabbling for more." So, here, the plaintiff did not confine his opposition to resistance of the nonsuit; but squabbled to maintain his entire verdict, till coming into Court he found himself obliged to submit to a reduction of damages. He also referred to *Garland v. Jeykyl and Another* (a).

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W. H. Watson, in support of the rule.—If the defendant had merely moved to reduce the damages to a shilling, the plaintiff might not, perhaps, have opposed it; but he added to his rule an alternative, which obliged the plaintiff to come into Court to protect his verdict, and the costs thereby incurred ought to be considered as costs in the cause. With respect to the case of *Spitta v. Woodman*, it was but of doubtful authority; for there was a manifest error either in it, or the case to which it in fact belonged. The first sentences in 3 *Taunt.* are these: "*Shepherd*, Serjt., moved that the Prothonotary might review his taxation of costs; a verdict had been found for the plaintiff as for a total loss; and a motion was made in the next term (*ante*, Vol. 2, p. 416) for a rule *nisi* to set aside the verdict and enter a nonsuit. The Court held, upon the decision of that rule, that the plaintiff was not entitled as for a total loss, but that he was entitled to a return of premium." Now he

(a) 2 Bing. 330; 9 Moore, 620, S. C.

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had referred to the case reported in Vol. 2, p. 426, and there was nothing there said about this holding of the Court. This case was not, therefore, to be implicitly relied upon. A part of it, indeed, was in his favour; for it cited a case (a) as having been decided in the *King's Bench* on the very principle for which he contended, *viz.* that the defendant, although entitled to some relief, made an improper motion, and compelled the plaintiff to come into Court to resist its excess. He had an affidavit also of such being the practice of the *King's Bench*.

TINDAL, C. J.—The point for our consideration is really this: whether the plaintiff is entitled to have considered as costs in the action the costs of a rule which was in substance decided against him. It is said not to be simply a rule on the point ultimately decided against him, but also a rule for setting aside the verdict in his favour and entering a nonsuit. Certainly, if any additional costs had been charged on the plaintiff, by the form of the rule, he ought to be allowed them on taxation; but the amount of the costs would have been the same if the rule had been confined to a single point, instead of presenting an alternative. If the plaintiff was obliged to come to the Court to support his verdict, the defendant was equally obliged to come to reduce the verdict to its proper amount; and the plaintiff, to entitle himself to the costs as costs in the cause, ought to have given notice to the other side that he gave up that part of the rule which he could not effectually oppose. Then the defendant would have proceeded to press the other branch of his rule at his own peril. Instead of that, however, the plaintiff gave no such notice, and only abandoned the point when he found it was not tenable. It is too much to expect that we should now give him the

(a) *Rough v. Thompson*, reported in 11 East, 428, but not on this point.

costs of an opposition in which he substantially failed, as costs in the cause.

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GASELEE, J., VAUGHAN, J., and BOSANQUET, J., concurred.

Rule discharged (a).

(a) See *Aliven v. Furnival*, ante, Vol. 1, p. 49.

WAUGH v. ASHFORD.

IT appeared from the affidavits on both sides in this case, that the defendant was a bankrupt, against whom judgment on a *cognovit* was signed on the 13th *March* last. On the 14th he was bailed. On the 12th *May* he was committed by a Subdivision Court of the Court of Bankruptcy for contempt, in not answering certain questions. On the 6th *June* the bail were served with writs of *scire facias* on their recognizance, calling on them to appear on the 12th *June*. The defendant being in *Newgate* under the commitment of the commissioners, they were unable to render him; and on the 11th *June* they obtained a rule calling on the plaintiff (who was solicitor to the defendant's assignees) to shew cause before a Judge at Chambers why they should not have time to render the defendant till he had passed his last examination. No one appearing to support this rule, it was afterwards discharged; but on the 18th *June* an order of Mr. Justice *Gaselee* was obtained, enlarging it to the present time.

Where a defendant has been committed to *Newgate* by commissioners of bankrupt, the *Common Pleas* cannot bring him up that he may be rendered in discharge of his bail, but they will enlarge the time for his render, although not "till he has passed his last examination."

Wilde, Serjt., and *Channell*, now shewed cause against this rule.—The Court had granted bail time to render their principal if a bankrupt, in some instances, till he had passed his last examination; but it had never been done in the

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case of a *London* commission, or, if it had, it was through inadvertence. But even where the Court had granted time in cases of country commissions, it had required that the affidavit on which the application was founded should shew some material inconvenience and expense than would be otherwise occasioned. The rule which had generally been acted upon was this: that the expense of commissioners making journies to take the bankrupt's last examination should be saved (a). The last Bankrupt Act had given commissioners facilities in this respect which they had not before. There was another class of cases also in which the Court had relaxed the rule, founded on the presumption that the bail have the custody of the defendant. That class comprised the cases in which the bail were placed in a situation that deprived them of the power of rendering their principal in consequence of some act of the law; as where a man was in custody of a king's messenger, and was in his way to the coast to be sent out of the country, the Court interfered to protect the bail (b). So, likewise, where a defendant had been a crown debtor, and the Court has had no authority to change the custody in which he was placed (c). But where a defendant was merely in such a state of health that his life would have been placed in jeopardy by his being rendered, the Court said that the bail must still discharge their obligations, or take the consequences (d). The only case they had been able to find which approximated to the present was that of *Gibson v. White* (e). That was a case in the Court of *Exchequer*, in which that Court said, that, "as the defendant is, as it

(a) See *Harris v. Allcock*, ante, Vol. 1, p. 568, and cases there cited; *Ruston v. Greene*, ante, Vol. 2, p. 617; *Coombs v. Dod*, Id. p. 766.

(b) See also *Merrick v. Vaucher*, 6 T. R. 50.

(c) *Hodgson v. Temple*, 1 Marsh. 166; 5 Taunt. 503, S. C.

(d) *Wynn v. Petty*, 4 East, 102.

(e) Ante, Vol. 1, p. 297.

were, in criminal custody, and the bail cannot make the render in due time, this is an exception to the general rule, and therefore the bail ought to have time to render." Now it must be clear that the bail there spoken of was bail to the sheriff, for otherwise they would have had no interest in coming forward. That case, therefore, was distinguishable from this. It would moreover appear (although no dates were given in any report of the case) as if the parties in *Gibson v. White* had become bail before the defendant had become bankrupt; while the bail in the present case entered into their recognizances after judgment had been obtained against the defendant, and applied to the Court after they were actually fixed in law, although time was granted them to retrieve their default. This case, too, was distinguishable from all that had preceded it in this, that the defendant was committed *sine die*. He had refused to answer the questions put to him, and the commissioners had committed him till he should be prepared to do so. The application now made to the Court was in effect, therefore, an application to enlarge the time for as long a period as the defendant should please. To grant the indulgence asked for in this case would be opening the door for the escape of bail wider than it had ever been before.

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Bompas, Serjt., and *Price*, in support of the rule.— This was an application to the justice and not to the indulgence of the Court; for had the cause been in the *King's Bench* instead of the *Common Pleas*, they should, as a matter of course, have had a writ of *habeas corpus* to bring up the defendant from *Newgate*, for the purpose of sending him back charged in this action. The case of *John Taylor* (a) was exactly similar to this. *Taylor* was brought up into the Court of *King's Bench*, in custody of the keeper of *Newgate*, by virtue of a writ of *habeas*

(a) 3 East, 232.

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corpus issued on the plea side of the Court. To this the keeper returned that he was committed to his custody by certain commissioners of bankrupt till he answered to their satisfaction certain questions. It was moved on behalf of the bail in two actions depending against the prisoner, that he might be surrendered in those actions in discharge of them; that he might be committed to the marshal *pro forma*, and then re-committed to *Newgate*. But "the Court, on the suggestion of the Master, determined that *Taylor*, being in custody on *criminal* process, ought to have been brought up by a *habeas corpus* issued on the crown side of the Court." Such a writ was accordingly taken out; *Taylor* was brought up under it, and recommitted to *Newgate*, charged with the several matters against him. Such was the practice in the *King's Bench*; but the other Courts, having no crown side, were obliged to adopt a different course, to render, as nearly as they could, the same justice to bail which they would have in the *King's Bench*. In the *Common Pleas* that course had been to enlarge the time till bail could render their principal. The principle on which he relied was laid down in 1 *Tidd's Practice* (a), that wherever, by the act of the law, a total impossibility or temporary impracticability to render a defendant had been occasioned, the Courts would relieve the bail from the unforeseen consequences of having become bound for a party whose condition has been so changed, by operation of law, as to put it out of their power to perform the alternative of their obligation without any default, laches, or possible collusion on their part. Now, it was impossible to say there was any collusion in this case. As to what had occurred being occasioned by the defendant's fault, so it was the party's fault in almost every case of a commitment to criminal custody. But it was not the fault of the bail who

(a) P. 293, ed. 9.

now sought relief. [TINDAL, C. J.—But you took the defendant out of custody from *March* to *April*, and when a difficulty occurs, seek to throw it upon the plaintiff.] In the *King's Bench* there would have been no difficulty. [TINDAL, C. J.—You were fixed, and would only have had relief in the *King's Bench ex gratia*, on the payment of costs.] Certainly it must be called *ex gratia*, but the practice was so fixed that there could be no doubt of the bail there obtaining perfect relief. [BOSANQUET, J.—But you ask an indefinite time. TINDAL, C. J.—It may be for the duration of the defendant's life.] But even in that case, the relief would have been granted in the *King's Bench*, and that more completely than this Court could grant it; for the defendant being once rendered, the bail would have been no longer liable; whereas the indefiniteness of the time at which they should be enabled to render him, which was urged as an objection to this application, was, in reality, a grievance on them for which this Court could grant no relief. The case of *Hodgson v. Temple* (a) shewed that this Court neither affords such effectual relief to bail as the *King's Bench*, nor the relief now asked for. The case in *Brod. & Bing.* (b) confirmed that case. *Ashmore v. Fletcher* (c) was in their favour, as was also the case of *Gibson v. White*, referred to on the other side. In that case, as long a time was granted as was rendered necessary by the commissioners appointing him to come up; and in this case the time could be rendered definite by the act of the commissioners calling the defendant before them. When they did would be the time for the bail to render the defendant. [BOSANQUET, J.—Could you not apply to the commissioners to send for him to examine him, and then render him?] It might be doubted whether the commissioners, having

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(a) 5 Taunt. 403.

(b) *Currie v. Kinnear*, 1 B. & B. 23.(c) 13 Price, 523; *McClelland*, 252, S. C.

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committed him till he answered certain questions, had the power to call him before them, except for the *bond fide* purpose of examining him upon the subject to which the questions related; and certainly they would not, because a third party wanted to send him to the *Fleet*, pretend that they wanted to examine him.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the Court.—This is an application on the part of bail to enlarge the time for surrendering their principal till he has passed his last examination. It is an application without precedent as far as the cases brought under our notice go. At the same time there are particular circumstances in the case which, although not sufficient to induce us to grant the application in its full extent, make it necessary, to meet the ends of justice, that we should do so to some extent. It is clear, that, if the circumstances which have been detailed to us had come before the Court of *King's Bench*, an easy remedy would have been found for them. A *habeas corpus* would have issued to the keeper of *Newgate* to bring up the defendant, who might then have been charged in this particular action; but the constitution of this Court does not entitle us to call up before us a party in criminal custody. We must, therefore, apply as full a remedy as we can, and as we think the circumstances of the case call for. We are not disposed to grant the application in its full extent, for it would only be an inducement to the party to lie by, and not endeavour to procure his examination and give the plaintiff his remedy. What the Court is disposed to do is to enlarge the time till the first day of next term, on payment of the costs of this application, and of the proceedings on the *scire facias*. This will give the parties an opportunity, if they think fit to use it, of going before the commissioners of bankrupt to obtain the defendant's committal to the custody of the

warden of the *Fleet*, and thus bring him within our power. The solicitor to the *fiat* is the plaintiff in this action, and will not, of course, occasion any unnecessary delay, which we should notice when the case again comes before us. When that happens we can consider further what steps to take. It would be most unpleasant to the Court, if defendants' bail, or other parties to the suits in it, should be placed in a situation as to the measure of justice administered by us different from that in which they would find themselves in the other Courts.

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The rule was drawn up accordingly, except that the time was extended, on application of *Bompas*, Serjt., and by permission of the Court, to the fifth day of next term.

DAVIDSON v. WATKINS.

IN this case judgment had been signed for want of a plea, the plea being that the defendant was an attorney, but not of this Court, and was entitled to be sued in the Court of which he was an attorney; but the plea was unaccompanied by an affidavit of verification. On cause being shewn against a rule *nisi* to set aside the judgment, the Court held, that a plea of privilege could not be distinguished from a plea in abatement, and, therefore, an affidavit of verification must accompany it.

A plea of privilege cannot be distinguished from a plea in abatement, and must be accompanied by an affidavit of verification.

Rule discharged.

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FRENCH v. ARCHER.

The *Reg. Gen.*
H. T. 4 W. 4
do not enable
defendant in an
action on a bill
of exchange at
the suit of an in-
dorsee, to plead
that he received
no consideration
from the drawer,
without shewing
circumstances
of fraud and
knowledge of
them on the
part of the
plaintiff.

ASSUMPSIT on a bill of exchange by an indorsee against the acceptor. Plea, "that the said bill of exchange was accepted by the said defendant without consideration passing from the drawer to the said defendant for accepting the same." Demurrer on the ground that the want of consideration is no defence to an action at the suit of an indorsee.

The Court having intimated that they wished to hear counsel in support of the plea—

R. Alexander was heard.—I submit that the plea is good; and, without going back to earlier cases, will rely upon *Heath v. Sansom* (a), in the marginal note of which the case is thus stated:—"S. being indebted to a firm in which he was partner, gave a note in the name of another firm, to which he also belonged, in discharge of his individual debt. The payees indorsed it over, and the indorsee sued the parties who appeared to be makers:—held, that this note was made in fraud of S.'s partner in the second firm, and could not be enforced against him by the payees, and that, at least, under these circumstances of suspicion, the indorsee could not recover without proving that he took the note for value, though no notice had been given him to prove the consideration." But the remaining point applies very stringently to the case before us. "Held, also, *Purke, J.* dissentiente, that in all cases, where, from defect of consideration, the original payee cannot recover on the note or bill, the indorsee, to maintain an action against the maker or acceptor, must prove consideration given by himself or a prior indorsee, though he may have had no notice that such proof will be called for." Now, it will be found, on referring to the recent rules, that the objection

(a) 2 B. & Ad. 291.

which, in *Heath v. Sansom*, arose at the trial, must now be taken on demurrer. The general issue of *non assumpsit* would have been pleaded, and the plaintiff would have had to make out a *prima facie* case of consideration, which it would have been the business of the defendant to overthrow. But the *Reg. Gen. of H. T.* 4 W. 4, have altered this. Under the head of "Pleadings in particular actions" Rule 3 says, "In every species of *assumpsit*, all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded. *Ex. gr.* Infancy, coverture, release, payment, performance, eligibility of consideration, either by statute or common law, drawing, indorsing, accepting, &c. bills or notes by way of accommodation." In order, therefore, to set up our defence, an usual one in cases of accommodation bills, it is absolutely necessary that we should plead it, and there is no other way of doing it than by saying, that there was no consideration between the drawer and acceptor. We having thus thrown suspicion on the transaction, the plaintiff is called upon to shew in his replication, what, under the old forms of pleading, he would have shewn at the trial. But instead of setting up the title questioned by the defendant, the plaintiff has demurred. We could not plead that the plaintiff gave no consideration, for that would have cast upon us the proof of a negative; and, it being a fact within his own knowledge, he is bound to plead it in his replication.

TINDAL, C. J.—I take the distinction between the case before us and that referred to at the bar is this:—in that case the question arose in evidence at the trial of the general issue; here it arises on a plea which professes on the face of it to be an answer to the action. Now, to be an answer to the action, it must cover all the circumstances of itself.

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We cannot help it out by assuming, that, if the case went to trial, such and such facts would appear. Here there is nothing but an allegation that the defendant received no consideration for the bill, without an attempt to shew *mala fides* in the plaintiff, or that the defendant had been cheated out of it. It is fair, therefore, that the plaintiff should be allowed to sue upon it, and judgment must be in his favour.

GASELEE, J.—It would lead to much inconvenience if in all cases of accommodation bills it were permitted to throw by plea upon holders the necessity of shewing consideration.

VAUGHAN, J.—The plea is not that the plaintiff did not give consideration for the bill, but that the person who drew it gave the acceptor no consideration. How can the plaintiff prove or know any thing about that?

BOSANQUET, J.—I think the plea is no answer to the declaration. In the case of *Heath v. Sansom*, a suspicion was raised, which it was incumbent on the plaintiff to clear up, but which he did not, and that was the ground of Mr. Justice Parke's judgment.

R. Alexander asked leave for the defendant to amend his plea.

Per Curiam.—Certainly not.

Bompas, Serjt., was to have supported the demurrer.

Judgment for the plaintiff.

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STEILL v. STURRY.

ASSUMPSIT for goods sold and delivered. The defendant asked leave to plead, 1st, *Non assumpsit*; 2nd, Payment as to part; 3rd, As to part, that the goods were warranted with a sample; 4th, As to part, that the goods were warranted of a merchantable quality; and 5th, As to part, that they were warranted to be one ton weight of black lead.

Pleas of *non assumpsit* and part payment will not be allowed together, nor a plea of a warranty with sample, and a plea founded on the warranty implied in law.

Per Curiam.—The first plea must be disallowed, for it is contradicted by the plea of payment as to part; and the fourth, founded on the implied warranty in law, must also be disallowed, for it is rendered needless by the third.

Rule accordingly.

DUEER v. TRIEBUER.

INDEBITATUS assumpsit, for work and labour done, and money paid to the use of the defendant.

Inconsistent pleas may be pleaded under the new rules, if intended *bond fide* to support different substantial grounds of defence.

Channell had obtained a rule *nisi*, calling upon the plaintiff to shew cause why the defendant should not be allowed to plead several matters, *viz.* 1st, the general issue as to the whole; and 2nd, that the demand for work and labour done arose out of an illegal wager as to the price of tallow.

Cleasby shewed cause against the rule.—These two pleas are inconsistent under the new rules. Under the head of “Pleadings in particular actions,” in the *Reg. Gen. H. T. 4 Will. 4*, title “*Assumpsit*,” (n) it is said, “in an action of *indebitatus assumpsit*, for goods sold and de-

(a) Ante, Vol. 2, p. 322.

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livered, the plea of *non assumpsit* will operate as a denial of the sale and delivery in point of fact." Now, the second plea in this case admits that the work and labour was done in point of fact. Under the old rule a plea of alien enemy was not allowed to be pleaded together with a plea of tender, to an action of *assumpsit*, *Shourbeck v. De la Cour* (a), because they were inconsistent. There is another ground on which the two pleas may be opposed, and it is this, that they come to the same thing; for the second plea may be made available under the plea of *non assumpsit*; and it has been expressly decided in the *Exchequer*, in *Neale v. M'Kensie* (b), that, where a party can give the special matter in evidence under the general issue, he shall not be allowed to plead both, but shall be put to his election.

TINDAL, C. J.—I do not think there is anything unreasonable in allowing a defendant to plead the general issue, and also that part of the work done was done on an illegal contract; and the rules do not lay it down as positive, that no pleas shall be pleaded which are inconsistent with each other. In the example given in the rules, some of the pleas are inconsistent, that is, cannot all be supposed to be true. Pleas of payment, release, and accord with satisfaction, may all be allowed. At the same time the Court would interfere if the pleas were inconsistent with each other, and introduced vexatiously for the purpose of putting the plaintiff to extra expense.

GASELER, J., concurred.

VAUGHAN, J.—The rule of *H. T. 4 Will. 4*, distinctly says, that several pleas shall be allowed if distinct grounds of answer or defence are intended to be established in respect of each; and that is the case here.

(a) 10 East, 426.

(b) Ante, Vol. 2, p. 702.

BOSANQUET. J.—This case does not stand upon the new rules, but upon the statute of *Anne*. The word “inconsistent” was studiously kept out of the rules, for the subject was discussed, and it was felt that there might be cases in which pleas might be inconsistent with each other, and sustain substantially different defences. The object had in view was to prevent the same defence being pleaded in different forms. Now, here, the first plea is a denial of the matter of fact; and, as under these rules a matter of law must be pleaded, the second plea is pleaded. Here is merely one plea to the matter of fact, and another to the matter of law.

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Rule absolute.

NICHOLLS v. LEFEVRE.

THIS was an action of trover for goods forwarded to the defendant by a person named *Le Conteur*, whose agent he was, and who had obtained them from the plaintiff under circumstances of alleged fraud. Five other actions had been brought against the same defendant by other plaintiffs, from whom *Le Conteur* had also obtained goods. *Bompas*, Serjt., having obtained a rule, calling upon the plaintiffs in the different actions to shew cause why they should not consent to stay their proceedings till this cause was tried, and let the other actions abide the event of this—

Where six actions of trover had been brought against the same defendant by different plaintiffs employing the same attorney, the Court refused to order the proceedings in five of them to be stayed to abide the result of one, it being sworn that the causes of action were different in all of them.

Wilde, Serjt., shewed cause.—This rule is not only unprecedented in its object, but in its terms; for, although the Court has often ordered proceedings to be stayed, it has never ordered the parties to consent to their being stayed. The rule was moved on the supposition that the defendant being the same, and the attorney for the plaintiffs the same in all the six actions, the circumstances must

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be the same; but, in the plaintiff's affidavits it is sworn, that the circumstances of fraud under which the goods were obtained were different in all the actions; that the witnesses were different, and that of necessity the evidence must be different. How the Court can, in such a state of things, direct the proceedings to be stayed, or all the trials to abide the event of one, was unintelligible.

THE COURT wished to know from the defendant's counsel whether he could produce any authority for such an application.

Bompas, Serjt.—In the case of a distillery company in which there were two actions, proceedings were stayed in one till the other was tried, because there was reason to believe, that both going on together would be injurious to the defendant. Proceedings were there stayed for the general purpose of justice, and the Court, it was to be hoped, would do so in this instance. The defendant would be overwhelmed by the number of actions brought against him, and not be able to try one of them. Even if he succeeded he would be ruined.

Per Curiam.—As it is sworn that the causes of action are different, and that the witnesses are different, we cannot interfere.

Rule discharged.

Coram TINDAL, C. J., GASELEE, J., VAUGHAN, J.,
and BOSANQUET, J.

1834.

WILKINSON, Executrix v. EDWARDS.

THIS was an action by an executrix on a promissory note for 20*l.*, drawn by the defendant and found in the possession of the testator at his death. The parties resided at *Abergavenny*, but the venue was laid in *Middlesex*. The defendant gave notice that he should dispute the consideration, and the plaintiff not proceeding to trial, judgment was signed as in case of a nonsuit. This was set aside on the plaintiff giving a peremptory undertaking to try. That undertaking he did not fulfil. He gave a second peremptory undertaking, but still not proceeding to trial, the defendant again signed judgment as in case of a nonsuit. The reason alleged for the plaintiff's not proceeding was, that he was unable to obtain evidence of the defendant's hand-writing, which he refused to admit, or to say more with respect to his defence than that he intended to deny owing the money. The plaintiff, having obtained a rule, calling upon the defendant to shew cause why he (the plaintiff) should not be relieved from the costs of the suit, pursuant to 3 & 4 *Will.* 4, c. 42, s. 31—

An executor plaintiff will be made to pay costs on the failure of his suit, if it appear that he commenced the action without ascertaining that he had a probability of proving his case.

Wilde, Serjt., shewed cause, and contended, that, under these circumstances, the plaintiff was not entitled to the favour she sought. Executor plaintiffs would be taught caution in bringing actions if they were made to feel that they were liable to costs like other people.

Atcherly, Serjt., drew a distinction between the costs of the action and the costs occasioned by the plaintiff's negligence, contending, that it was the latter only she ought to pay, and cited *Woolley v. Sloper* (a). It was to be remembered, that it was the duty of the plaintiff to bring this action.

(a) *Ante*, Vol. 2, p. 208.

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TINDAL, C. J.—It has not been on account of merits of executors, or of any enactment in their favour, that costs have not heretofore been recoverable against them; but on account of the form of the statute which first gave defendants costs having been held not to include them. This exemption of executor plaintiffs from the payment of costs having been thought unreasonable, the late statute enacts, that executors and administrators shall, unless the Court otherwise direct, be liable to pay costs to defendants in case of being nonsuited, or verdicts passing against them. The matter being thus placed in the discretion of the Court, the question is, whether the particular circumstances brought before us be such as to induce us to excuse the plaintiff. It is said that it was the plaintiff's duty to bring this action; but I hold it to be a plaintiff's duty before he brings an action to ascertain that he can establish his case. The plaintiff here fails, because he is unprovided with proof of the hand-writing of the defendant. It was, therefore, a hasty proceeding to bring this action; and the other facts in the case, such as laying the venue in *Middlesex*, when even if she found a witness to swear to the hand-writing it would have been in *Monmouthshire*, and the two peremptory undertakings the plaintiff gave to try the cause, do not incline me to favour this motion. She has occasioned great expense and she must suffer for it.

The rest of the Court concurring—

Rule discharged.

Coram TINDAL, C. J., GASELEE, J., VAUGHAN, J.,
and BOSANQUET, J.

1834.

DUDDIN v. LONG.

A RULE under the Interpleader Act had been obtained in this case by the Sheriffs of *Wilts*, calling upon the plaintiff and the assignees of the estate and effects of the defendant, now dead, to shew cause why all further proceedings against the sheriff should not be stayed. It appeared by the affidavits, that the under-sheriff of *Wilts* was in partnership with another solicitor at *Salisbury*, and that, when a writ of execution of the plaintiffs against the defendant was sent down to them to be executed, the plaintiff's agent was induced by the firm not to have it executed for a week, and in the course of the time thus gained, other creditors of the defendant were prompted to issue a fiat of bankruptcy against him, to which the under-sheriff's partner was solicitor.

Where the sheriff is placed in circumstances which give him an interest in either side, the Court will not relieve him under the Interpleader Act.

Ludlow, Serjt., shewed cause against the rule, and contended that the sheriff was not entitled to relief under the Interpleader Act, if he appeared to be placed in circumstances, which, in the case of other parties, would be reckoned proofs of collusion.

Coleridge, Serjt., supported the rule.

Per Curiam.—The sheriff ought to have no interest on either side, and in the present case he would not be considered to be without bias. There was an intermixing of interest between the sheriff and the assignees, (the under-sheriff being the partner of the solicitor to the commission), which made it unadvisable to apply to the former, in this particular instance, the relief provided by the statute.

Rule discharged.

Coram TINDAL, C. J., GASELEE, J., VAUGHAN, J., and BOSANQUET, J.

1834.

POWER v. FRY.

8 *Reg. Gen. H. T. 4 Will. 4*, does not apply to judgments in other cases pleaded by an executor.

The old rule of practice in the *Common Pleas* requiring pleas to be signed by a Serjeant is virtually repealed by his Majesty's warrant of 24th April, 1834, throwing open that Court.

A RULE had been obtained by *Wilde*, Serjt., calling upon the plaintiff to shew cause why the interlocutory judgment signed in this case as for want of a plea, should not be set aside for irregularity, and the costs of the application be paid by his attorney.

Bompas, Serjt., shewed cause.—There are two grounds on which the judgment may be supported. The principal one is drawn from the *Reg. Gen. H. T. 4 Will. 4*. In rule 8 (a), it is said, “where a defendant shall plead a plea of judgment recovered in another Court, he shall, in the margin of such plea, state the date of such judgment; and, if such judgment shall be in a Court of record, the number of the roll on which such proceedings are entered, if any; and, in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea.” Now this was an action against the defendant as executor, and he had pleaded two judgments recovered against him in the *King's Bench* and *Exchequer*, omitting to comply with the requisites of the rule of *Hilary Term*.

TINDAL, C. J.—The rule means judgments recovered, which are answers to the action. The judgments spoken of in this plea are merely collateral, and the substance of the plea is, that the defendant has no money left wherewith to pay you.

Bompas, Serjt.—If the Court thinks that “judgment recovered” is a technical term signifying the same cause of action in another Court, the plaintiff has no *locus*

(a) Ante, Vol. 2, p. 305.

standi; but it will be difficult so to restrict the meaning of the words of the rule. The rule was intended to prevent sham pleas, and if a set-off in the shape of judgment recovered in another Court can be set up, the door to them may be opened. The other objection to the plea is, that it is not signed by a Serjeant. Undoubtedly, the Court has been opened, but there is nothing in the new rules to abolish the ancient practice and rule of Court, which requires pleas to be signed by a Serjeant, nothing to take away the privileges of one class, and give them to another. It may be fitting that it should be done; but till a rule has been laid down and promulgated to that effect, the old rule exists in full force.

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TINDAL, C. J.—As to the first objection, it is possible that the rule as to judgments recovered may not be conceived in terms wide enough to meet some cases in which similar difficulties may hereafter arise; but it cannot be supposed, on reading the rule, that the plea of an executor, that he has no assets beyond what have been recovered by judgment against him falls within it. The important part of the plea is, that he has nothing wherewith to pay. As to the second objection, that the plea has been signed in breach of good faith by those who have reaped the benefit of the throwing open of the Court, I think it also untenable. His Majesty, by his Royal Warrant, dated the 24th *April* of this year (*a*), orders and directs, “that the right of practising, pleading, and audience in our said Court of *Common Pleas*, during term time, shall upon and from the first day of *Trinity* Term now next ensuing, cease to be exercised exclusively by the Serjeants at law; and that, upon and from that day, our counsel learned in the law, and all other barristers at law, shall and may,

(*a*) Ante, Vol. 2, p. 814.

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according to their respective rank and seniority, have and exercise equal right of practising, pleading, and audience in the said Court of *Common Pleas*, at *Westminster*, with the Serjeants at law." I think that this virtually repealed the rule which before required pleas to have the signature of a Serjeant.

The rest of the Court concurred.

Bompas, Serjt.—As the point is new, the Court, it is to be hoped, will not inflict costs upon the plaintiff.

TINDAL, C. J.—Signing judgment is a taking of the law into your own hands, for which you must be liable for costs. You must pay the costs.

Rule absolute, with costs.

Coram TINDAL, C. J., GASELEE, J., VAUGHAN, J., and BOSANQUET, J.

ROGERS v. PECKHAM, a Prisoner.

If the twenty days' notice required by s. 16 of the Lords' Act expires after the seven first days of term the insolvent cannot be brought up till the next term.

CRIPPS moved for a rule to bring up the defendant under the compulsory clause of the Lords' Act, 32 *Geo. 2*, c. 28. In the marginal note to a case in 8 *Bing.* (a), it was said, that it was too late to move to bring up an insolvent under the compulsory clause of the Lords' Act, on the seventh day of term (b); but he apprehended that this went both further than the case itself absolutely warranted, and further than the true construction of the act warranted. The 16th section of the Lords' Act authorized

(a) *Acraman v. Harrison*, 1 M. & Scott, 240; S. C. 8 *Bing.* 154. (b) The present application was made in the third week of term.

creditors to require a prisoner in execution under certain circumstances, on giving him twenty days' notice in writing, to give in to the Court from which the process charging him in execution issued, "within the first seven days of the term which shall next ensue the expiration of the said twenty days," a true account in writing of all his real and personal estate. Now, the first seven days being in a term which should ensue after the expiration of the notice was what was here meant. The ensuing term was not meant, but the ensuing days. If the word "the" were omitted before the word "term," there could not be a doubt of such being the construction of the act. That this construction might be put upon the act was shewn in the case of *Dereuxy v. Gorden*, M. T. 37 Geo. 3, in a note on this section of the act in 1 *Chitt. Stat.* 582.

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TINDAL, C. J.—We need not say what would be the case if the word "the" were left out, but we have no authority to leave it out; and when we recollect how highly penal the act is as regards insolvent debtors, we think the safer construction is, that you are too late now, and must come next term.

Cripps took nothing by his motion (a).

(a) See *Hayward v. Priest*, Ante, Vol. 2, p. 737.

ALLEN v. GILBY.

ARCHBOLD applied to the Court for a rule under the first section of the Interpleader Act, on the following

Where an auctioneer has one action brought against him in *Common Pleas*,

and another in *King's Bench*, by different claimants for the same property, he must, to relieve himself under the Interpleader Act, obtain rules in both Courts.

If a part of a sum claimed by the parties has been paid to one of them before adverse claim made, the adverse claimant has a right to have the whole sum he claims paid into Court on the holder applying for relief under the Interpleader Act.

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state of facts:—An auctioneer, on whose behalf he applied, had goods sent to him for sale by a person named *Renshaw*, who had other goods and money from him on account of the goods so sent, to the amount of 10*l.* The auctioneer having sold part of the goods, *Allen*, the plaintiff in this action, came forward to claim the amount they had produced, and the value of those at the time unsold. *Renshaw*, on the other hand, insisted upon having the money produced by the goods he sent, and brought an action for it in the Court of *King's Bench*, while *Allen* brought this action in the Court of *Common Pleas*. There could be no doubt as to the auctioneer's right to relief under the Interpleader Act; but the question was as to the manner of drawing up the rule?

TINDAL, C. J.—You must get rules in both Courts.

Archbold.—Another question is, whether the rule shall be drawn up on the auctioneer bringing into Court 13*l.* the amount really due, or whether he must pay into Court the whole of the money the goods produced, *viz.* 23*l.* and a fraction?

TINDAL, C. J.—You must pay into Court all claimed in this action, which is the whole of the money produced by the goods.

Archbold's ultimate note of the amount to be mentioned in the rule was 13*l.*, or such other sum as the Court shall think fit.

Rule *nisi* accordingly (a).

Coram TINDAL, C. J., GASELEE, J., VAUGHAN, J., and BOSANQUET, J.

(a) See *Bragg v. Hopkins*, Ante, Vol. 2, p. 151.

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MOORE v. BOLCOTT.

ASSUMPSIT for work and labour as an attorney. Plea, that the charges mentioned in the declaration were "charges at law and in equity;" and that the plaintiff had not delivered his bill one month before action brought, as required by the statute. Replication, that the charges mentioned in the declaration were not "charges at law and in equity." Special demurrer, on the ground that the replication was in the conjunctive instead of the disjunctive.

A replication is bad although it follows the very words of the plea, if it does not answer it in substance.

Whitmore, in support of the demurrer.—What the defendant substantially asserts in his plea is, that the plaintiff's bill comes within the 23 *Geo. 2*, and that is what the plaintiff is called upon to deny. Now, that act requires that an attorney's bill for fees in law or equity should be delivered one month before he can bring any suit or action for it. The plaintiff cannot be excused, therefore, for the non-delivery of his bill one month before action brought, if it contains charges either in law or equity. Unless the defendant had demurred to the replication, he must, as the pleadings stand, have shewn that the plaintiff's fees were for business both in law and equity, which it is not necessary under the act he should do. The traverse of the plaintiff was rendered bad by making an immaterial part of the plea parcel of the issue. *Colborne v. Stockdale* (a), and *Goram v. Sweeting* (b).

Beckett supported the replication, and contended that it was good, inasmuch as it strictly followed the plea; and the defendant must be supposed to know what business he

(a) 1 Strange, 493.

(b) 2 Saund. 206.

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had employed the plaintiff in. He relied upon the case of *Wood v. Bridden* (a).

Per Curiam.—The replication is bad. The act requires an attorney's bill to be sent one month before action brought, if it contains charges for fees in law or equity. The imputation in the plea is, that it came within the statute; and that imputation the plaintiff should have answered, by saying that his bill contained charges neither in law nor equity. All the authorities are one way except the case in *Hobart's Reports*, and there the objection was not taken till after verdict.

Judgment for the defendant.

(a) *Hobart*, 119.

GARDNER v. ALEXANDER.

Evidence of a special contract may be given under the general issue to a declaration in the common form for goods bargained and sold.

KELLY moved for a rule for leave to plead several matters. The action was for goods bargained and sold. The declaration was in the common form, and the alleged defence was, that the goods were bargained and sold; but that it was under a special written contract, two of the conditions of which were, that the goods should be shipped within the current month, and landed in *London* within a given time. Neither conditions having been complied with, the defendant refused to accept the goods. The difficulty which had arisen in the mind of the special pleader was, whether proof of these facts could be given under the general issue, or whether it was not requisite to plead them specially.

Per Curiam.—It is unnecessary: you may give in evidence the special contract under the general issue.

Kelly took nothing by his motion.

1834.

THOMPSON v. BRADBURY and Others.

THIS was an action of a landlord against the assignees of a bankrupt named *Andrew White* for the rent of certain premises leased to the bankrupt. A rule had been obtained by *Hoggins*, calling upon the plaintiff to shew cause why the defendants should not have leave to plead several matters, *viz.* First, "That the said term of years granted to the said *Andrew White*, as in the said declaration mentioned, did not vest in the said defendants." To the second plea there was no objection; it related to the covenants to repair. The third was, "That the term of years granted to the said *Andrew White* came to and vested in one *William Venables*, who afterwards was duly declared a bankrupt, and that *E. E.*, one of the said defendants, was duly appointed official assignee of his estate, and the other defendants, *J. D.*, *J. B.*, and *G. H.*, were duly appointed assignees of his estate and effects with the said official assignee, who afterwards abandoned, declined, and refused to accept the said term of years, and that *therefore* they the said defendants never became the assignees thereof, and the same never vested in the defendants, so that the same defendants should be charged with the performance of the covenant in the said declaration mentioned."

In answer to an action by a landlord against the assignees of a bankrupt for rent, the latter may plead, that the term did not vest in them; and to avoid the effect of 1 & 2 Will. 4, c. 56, s. 25, also, that it did vest, but that they abandoned it, and were not therefore liable.

Amos shewed cause against the rule.—The objection to the third plea arises after the word "therefore." There is no difference in law between the premises vesting by assignment, and vesting in such a manner that the assignees should be charged with the performance of the covenants in the declaration mentioned. Under the allegations of the declaration, it would be necessary for the plaintiff to prove that the defendants are charged with the covenants in the declaration mentioned, and there is no

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evidence admissible under the last plea that might not be given under the first. The statute passes nothing till acceptance by the assignees. *Copeland v. Stephens* (a).

TINDAL, C. J.—Cannot the defendants give in evidence every thing they want under the third plea?

Hoggins, in support of the rule.—I apprehend both the first and third are necessary. *Copeland v. Stephens* was decided before the passing of the 1 & 2 Will. 4, c. 56; in s. 25 of which act it is said, "That when any person hath been adjudged a bankrupt, all his personal estate and effects, present and future, which by the laws now in force may be assigned by commissioners acting in the execution of a commission against such bankrupt, shall become absolutely vested in and transferred to the assignees or assignee for the time being by virtue of their appointment, without any deed of assignment for that purpose, as fully to all intents as if such estate and effects were assigned by deed to such assignees and the survivor of them." Although, therefore, there may be no acceptance by the assignees, yet the term vests in them. The first plea is a general traverse that the term did not vest in the defendants; and the third admits that it did vest in them *sub modo*, viz. that they were appointed assignees, accepted of the appointment, and afterwards abandoned the term, thereby freeing themselves from the covenants contained in the lease.

BOSANQUET, J.—Do you not by one plea deny the obligation absolutely, and by another conditionally, the very thing intended to be guarded against in the new rules.

Hoggins.—The substance of the third plea is, that al-

(a) 1 B. & Ald. 593.

though the statute vests the term in the defendants, yet that they by an act of their own divested themselves of it; quite a different plea from the first, which is that it never vested in us.

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BOSANQUET, J.—If it never vested, how can you abandon?

TINDAL, C. J.—Does the 25th section of the Bankrupt Court Act say more than this, that the term shall vest in the assignees as if by assignment? And an assignment would not vest till acceptance.

Hoggins.—If your Lordship could enable us to say that at the trial, we should have no difficulty in taking one of these pleas only; but the words of the section (on which no case has heretofore arisen) are, that the personal estate and effects of the bankrupt “shall become absolutely vested in and transferred” to the assignees for the time being. Therefore it is that we are obliged to have the third plea. Suppose the defendants rested upon the first plea only; they would be told at the trial that no acceptance is required, that the premises vest in them by force of the act of Parliament, and that therefore they are liable. Or suppose that they rest upon the third only, and there is proof of neither acceptance nor abandonment, they would be defeated for want of the first which would then save them. Or suppose it proved that there was an acceptance, but a subsequent abandonment, although we should not be liable, we could not stand upon the first plea alone.

TINDAL, C. J.—Both pleas may be retained; the first as it stands: but the third must be altered so as to confine the issue upon it to the question of abandonment, avoiding in it a denial of the vesting, which is already denied in the first plea.

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GASELEE, J.—In my opinion, the defendants would not be at liberty to give evidence of a subsequent abandonment under the first plea, for the act of Parliament would conclude them. They must, therefore, be allowed the third plea, modified as suggested by the Lord Chief Justice.

VAUGHAN, J., and BOSANQUET, J., concurred.

Rule accordingly.

BORDER v. LEVI.

Quære, whether it is necessary to state in a *capias* the county in which a defendant is supposed to reside?

A RULE had been obtained in this by *Atcherly*, Serjt., calling upon the plaintiff to shew cause why the copy of the writ of *capias* should not be set aside, and the bail-bond delivered up to be cancelled for irregularity. The irregularity complained of was, that the defendant was described to be of "*Lemon Street, Goodman's Fields*," without stating the town or county where the place is situate; and also the plaintiff's attorney's residence was described simply "*23, Lemon Street*."

Comyn shewed cause; and argued, as a preliminary objection, that the rule was irregular for asking to have the copy of the writ set aside instead of the writ itself. But

The Court overruled the objection, on the ground that the copy might be bad and the writ good, and that at all events the defendant could know nothing of the writ except by the copy served upon him (a).

Comyn.—The description of the defendant's residence in the writ is sufficient; for the writ being addressed to the sheriff of *Middlesex*, and directing him to take the defen-

(a) Vide *Anon. ante*, Vol. 1, p. 654; 1 Cr. & M. 408, S. C.

dant if found in his bailiwick, it is clearly unnecessary to add the name of the county to his residence. With regard to the mere addition of the county to the plaintiff's attorney's residence, it is not required by the Uniformity of Process Act, nor is it given in the forms appended to *Tidd's Practice* and *Chitty's Archbold's Practice*.

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Atcherly, Serjt., in support of the rule.—If the description of the defendant's residence here given be held good, it will be deciding that none at all is necessary. As to the residence of the plaintiff's attorney, it is intended by the 2 Will. 4, c. 39, s. 12, that there should be a clear description of it indorsed on the writ, in order that the defendant may know where to go to settle the action. Notoriety as to where *Lemon Street*, or any other place is, will not do, because it will not be a clear direction to a defendant.

TINDAL, C. J.—The only question we need consider is the first, *viz.* whether the defendant's residence is sufficiently described in the writ of *capias* by naming the street without naming the county. The first section of the Uniformity of Process Act requires absolutely that the county of the defendant's residence should be inserted in the writ of summons; but the fourth section, which applies to the writ of *capias*, contains no such requisition. Nor is it necessary that it should, for the writ is addressed to the sheriff, who can only execute it in his own bailiwick. Further, the form given in the schedule of the act leaves a blank for the county in the writ of summons, but none in the writ of *capias*; and one of the indorsements to this latter writ, which directs how the plaintiff's attorney, or the plaintiff himself, shall describe his residence, omits to mention the county. In my opinion, the objections taken to the writ are neither of them valid.

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GASELEE, J., concurred, and referred to *Roberts v. Wedderburne* (a).

VAUGHAN, J.—In the case of *Webb v. Lawrence* (b), the description of the defendant was, “*Kent Street*, in the county of *Surrey*,” and Lord *Lyndhurst* said, that the act did not require the number of the house to be given. It does not; but I think that that description would have been too general without the addition of the county. I am of opinion, therefore, that the description is in this case too general.

BOSANQUET, J.—I think the fourth section of the Uniformity of Process Act should be construed with reference to the first, which clearly requires the county to be stated.

Their Lordships being equally divided, the rule was not made absolute (c).

(a) Ante, Vol. 2, p. 816.

(b) Ante, Vol. 2, p. 81.

(c) *Perring and Others v. Turner*, ante, p. 15; *Welsh v. Langford*, ante, Vol. 2, p. 498; *Buffle*

v. Jackson, Id. p. 505; *King v. Monkhouse*, Id. p. 221; *Engleheart v. Eyre*, Id. p. 146—3rd point.

COURT OF EXCHEQUER,

Michaelmas Term,

IN THE FIFTH YEAR OF THE REIGN OF WILLIAM IV.

MOON v. THYNNE.

1834.

ARCHBOLD applied for a *distringas*. He produced the usual affidavit, that three calls had been made at the defendant's house in *Richmond Terrace*, and an appointment was made on the first two occasions, but no service had been effected; on the last occasion a copy was left. The affidavit proceeded to state, that the only person seen at the house was a servant, and the answer given every time was, that the defendant was gone abroad, but where the servant could not tell. It was sworn that the defendant was gone abroad to avoid his creditors. It was contended, that, under these circumstances, the Court ought to grant a *distringas*, otherwise the plaintiff would be without remedy, for the defendant could not be outlawed, as he was abroad when the writ was sued out, and he might for that cause set aside such an outlawry at any time, without appearing to this action (a).

A *distringas* was granted against a defendant, though he had not been served with the writ, it appearing that he had gone abroad to avoid his creditors, and had left servants at his house in town.

GURNEY, B. (b)—You may take your rule.

Rule granted.

(a) In *Ashby v. Stockwell*, Barnes, 324, and *Barclay v. Green*, Barnes, 325, cited 2 Sellen, 299, it is said, that, where the party is beyond the seas at the time of the commencement of the outlawry, if it appears

that it is with a view of absconding and defeating his creditors, the Court will not reverse the outlawry on motion.

(b) Sitting alone.

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v.
ENGLISH.

ever, held that the witness was incompetent, without a release; but in order to save time, it was proposed and agreed to, that the witness should be examined without waiting for the release, which was to be prepared in the meantime. The witness was accordingly examined, and the plaintiff had a verdict. After the trial, the plaintiff's attorney, upon being applied to by the opposite side to release the witness according to the previous agreement, refused to do so, alleging that he had consulted his counsel, who were of opinion that a release was not necessary. It was contended, that this was a fraud upon the Judge, who only allowed the witness to be examined on the understanding that he was to be released, and that it was also a fraud upon the plaintiff.

LORD LYNTHURST, C. B.—This seems to me to be merely a question between the witness and the attorney. I do not see how it can affect the verdict.

PARKE, B.—The only question is, whether the evidence was given by the witness upon a condition strictly so called. It rather appears that you agreed to receive his evidence for the convenience of all parties, upon the attorney's undertaking to give him a release; his non-compliance with that undertaking would justify an application against him by the witness, but can be no ground for the defendant to move upon, as the bias of the witness was as much removed by the undertaking as it would have been by the release.

ALDERSON, B.—It appears to me to be a matter in which the witness only is concerned. The plaintiff ought not to have trusted the defendant's attorney.

Rule refused.

1834.

NURSE v. GEETING.

ALEXANDER had obtained a rule *nisi* for setting aside the judgment and subsequent proceedings with costs for irregularity. The defendant was served with the writ of summons on the 10th *October*, and on the 25th a declaration was filed (an appearance having been entered according to the statute), and notice given to plead in four days. Judgment was signed on the 31st for want of a plea. The objection was, that the defendant was entitled to an imparlance. The rule was granted on the authority of *Frean v. Chaplin* (a), in which it was held, that, where the plaintiff declares in vacation, the defendant is entitled to an imparlance.

Since the Uniformity of Process Act, a defendant is not in any case entitled to an imparlance.

C. Jones shewed cause.—He cited the 11th section of the Uniformity of Process Act (b), which, after reciting that, according to the present practice in certain cases, no proceedings can be effectually had on any writ returnable within four days of the end of any term, until the beginning of the ensuing term, whereby an unnecessary delay is sometimes created, for remedy thereof enacts, “that if any writ of *summons, capias, or detainer*, issued by authority of this act, shall be served or executed on any day, whether in term or vacation, all necessary proceedings to judgment and execution may, except as hereinafter provided, be had thereon without delay, at the expiration of eight days from the service or execution thereof, on whatever day the last of such eight days may happen to fall, whether in term or vacation.” That section he contended would lose all its effect, and proceedings be very much delayed, contrary to the evident intention of the act, if the defendant was still entitled to an imparlance.

(a) Ante, Vol. 2, p. 523.

(b) 2 Will. 4, c. 39.

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 NURSE
 v.
 GEETING.

PARKE, B.—I always understood, that, since the Uniformity of Process Act, there was an end of imparlances; but as there is a decision upon the point, we will speak to the Judges of the *King's Bench*.

ALDERSON, B.—I have acted at Chambers twenty times upon the notion that imparlances were abolished.

Cur. adv. vult.

Upon a subsequent day, Mr. Baron PARKE said that he had consulted the Judges of the other Courts upon the subject, and that they were all of opinion, that, since the Uniformity of Process Act, imparlances are done away with, and that proceedings may be continued in vacation without any imparlance. There was no reason to doubt the correctness of the report of *Frean v. Chaplin*; and as the present case was moved on the authority of that decision, it would be discharged, but without costs.

Rule discharged, without costs.

RIX v. KINGSTON.

PETERSDORFF opposed bail on the ground of the affidavit of justification being defective in several respects: the Court, however, gave further time on the condition that an affidavit of merits should be made. On a subsequent day the bail appearing to justify, *Petersdorff* objected that the defendant had pleaded a plea upon which the merits of the case could not come in question, and he contended that it was a virtual breach of the condition on which time was allowed.

A defendant had leave to add another bail on condition of making an affidavit of merits, which he did, but pleaded a plea by which the merits could not come in question. This was held not to be a virtual breach of the condition.

GURNEY, B. (a)—I think, as there is an affidavit of merits, the bail may justify.

1834.

Rix

v.

KINGSTON.

Chilton, in support of bail.

On a subsequent day, the defendant obtained a Judge's order to add a plea of the general issue. The former plea was, that the defendant, at the time stated in the declaration, was not detained in custody as therein alleged.

A plea that the defendant was not detained in custody as alleged in the declaration, was held to be such a vexatious and frivolous plea as to deprive the defendant of his right to add the general issue, there being an affidavit of merits.

Petersdorff thereupon applied to set aside that order. The action was for goods sold and delivered. The special plea he contended was a vexatious and frivolous plea, not a plea to the merits, but pleaded for the purpose of inviting a demurrer and getting time. Pleading such a plea by itself was quite inconsistent with the idea of the defendant having a good defence on the merits, as it is sworn they have, and, therefore, they ought not to be allowed any favour. He referred to the rules for pleading of *H. T. 4 Will. 4*, r. 5, the object of which was to prevent two pleas being pleaded unless there were two distinct subjects of defence.

PARKE, B.—I am not so satisfied that the first plea was bad; but after an affidavit of merits, I think the case is different and they ought to be let in.

ALDERSON, B.—If the plea was frivolous, you might have applied to a Judge at Chambers to set it aside (b).

Rule refused.

(a) The only Judge in Court.

(b) This, it was said, had been done, and the application refused.

1834.

WALTHER v. SYERS.

Where part of the cause of action arises on a bill of exchange, the venue can not be changed on the common affidavit; but in such a case the venue can only be changed under special circumstances.

ARCHBOLD moved to change the venue from *London* to *Liverpool*, upon the common affidavit that the cause of action (if any) arose at *Liverpool*, and not elsewhere. The action was for 180*l.*, partly on a bill of exchange for 100*l.*, and the remainder for goods sold. The goods were not the consideration for the bill, but were a distinct demand. On this ground he contended, on the authority of *Greenway v. Carrington (a)*, that he was entitled to a rule.

GURNEY, B., before whom the motion was made, took time to consult with the other Judges, and ultimately he pronounced his judgment by saying, that he had consulted all the other Judges, and they were of opinion, that, where part of the demand arises on a bill of exchange, the venue can only be changed on special grounds.

(a) 7 Price, 564.

DAWSON v. BOWMAN.

Where a rule for changing the venue has been obtained on the common affidavit, in a case in which the venue can only be obtained on special grounds, and a rule is obtained for bringing back the venue, it will be no answer to the latter rule to shew that there are special grounds for keeping the venue at the place to which it has been changed; but those grounds must be made the subject of an independent motion for changing the venue in the first instance.

THIS was an action to recover the sum of 125*l.* One count was on a bill of exchange for 61*l.* 13*s.* 6*d.*, and the other counts were for interest and goods sold. A rule to change the venue had been obtained on the usual affidavit. A rule *nisi* was afterwards obtained for discharging the rule for changing the venue, on the ground that part of the cause of action arising on a bill of exchange the venue could not be changed.

Where a rule for changing the venue has been obtained on the common affidavit, in a case in which the venue can only be obtained on special grounds, and a rule is obtained for bringing back the venue, it will be no answer to the latter rule to shew that there are special grounds for keeping the venue at the place to which it has been changed; but those grounds must be made the subject of an independent motion for changing the venue in the first instance.

Chilton shewed cause.—He admitted, that, since the decision in *Walthew v. Syers* (a), the case of *Greenway v. Carrington* (b) must be considered as overruled; but his affidavit shewed special ground for changing the venue; for all the witnesses, it was sworn, lived at the place to which the venue had been changed.

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DAWSON
v.
BOWMAN.

PARKE, B.—The practice in the *King's Bench* is the same as in this Court. It was expressly laid down in *Walthew v. Syers*, that the venue cannot be changed under these circumstances.

ALDERSON, B.—The special circumstances stated are no ground for discharging this rule. They must be made the subject of an independent motion, and then the other side will have an opportunity of answering them. As there was a doubt about the practice, the rule will be absolute without costs.

Rule absolute, without costs.

(a) Ante, p. 160.

(b) 7 Price, 564.

Ex parte —.

MANNING applied for a *habeas corpus* to bring up a person who was confined in a lunatic asylum, for the purpose of producing him as a witness. The affidavit stated that he was rational.

In order to obtain a *habeas corpus* to bring up a person confined in a lunatic asylum, it is necessary that the affidavit should shew that he is in a fit state to be removed, and that he is not a dangerous lunatic.

PARKE, B.—You may have a writ by applying to a Judge at Chambers, upon an affidavit that he is in a fit state to be removed, and is not a dangerous lunatic.

1834.

CLEASBY *v.* POOLE and Others.

It is no ground for discharging a rule for judgment as in case of a nonsuit, on a peremptory undertaking, that the attorney withdrew the record because the plaintiff had promised to supply him with money, and having failed to do so the attorney withdrew the record.

THIS was a motion for judgment as in case of a nonsuit.

Comyn shewed cause on an affidavit that the plaintiff had promised to furnish his attorney with money, but having been unable, through poverty, to do so, the attorney withdrew the record. The plaintiff he said was ready to try, and offered a peremptory undertaking.

Udall, in support of the rule, contended that these circumstances, though they justified the attorney in not proceeding, was no cause for the defendant to shew against this rule; and it was not even now sworn that in fact the plaintiff had not at the time sufficient money.

PARKE, B.—I think it would be going farther than any case has yet gone, if we were to allow this excuse to be a good answer to the rule. It is a good answer for the attorney, but not for the client.

ALDERSON, B.—There must be some cause alleged before we can discharge the rule, otherwise we should repeal the act of Parliament. It may be hard upon the plaintiff, but we must look to both sides, and the plaintiff is not without remedy. We have already gone far enough on the occasion.

BOLLAND and GURNEY, Barons, concurred.

Rule absolute (*a*).

(*a*) See *Nicholl v. Collingwood*, ante, Vol. 2, p. 60.

1834.

HENN v. NECK.

THIS was an action by the indorsee against the indorser of a promissory note, and was tried before the secondary, and the plaintiff had a verdict for 12*l.*, the amount of the note. The case was proved principally by admissions of a debt, and a proposal to pay by instalments; but the amount of the debt was not stated, neither was the note itself produced.

Upon a trial under the writ of trial act, in an action on a promissory note, *semble* that the note should be produced: but if the objection was not taken at the time, the non-production of the note is no ground afterwards for a new trial.

Archbold moved to set aside the verdict, and have a new trial. He contended, that, at least, the note should have been produced, according to *Davis v. Dodd* (a), where it was held that payment of a bill of exchange could not be enforced without producing the bill.

PARKE, B.—It does not appear that you required it to be produced, and, if you did not make the objection at the trial, you have no ground now to move for a new trial.

LYNDHURST, C. B.—It ought to appear either by the notes or the affidavit that you required the production of the note; for, if you had, the witness might have produced it, and therefore you are now too late to take the objection.

Rule refused.

(a) 4 Taunt. 602.

 PHILLIPS v. TURNER.

MILLER moved to set aside proceedings for irregularity, on the ground of a defect in the affidavit to hold to

defendant is indebted on the bill, which was payable at a day past, is sufficient, without stating that the bill was not paid when due, or that it is still unpaid.

An affidavit of debt on a bill of exchange, which states that the

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PHILLIPS
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bail. The affidavit stated, that the defendant was indebted to the plaintiff in the principal sum of 30*l.* on a bill of exchange, drawn by *G. Hawkins*, upon and accepted by the defendant, payable at a day now past, and by the said *G. H.* indorsed to *R. P.*, and by him to the plaintiff; but it did not allege expressly that the bill was unpaid or overdue, which, it was contended, was necessary, independently of the allegation at the commencement that the defendant was indebted.

GURNEY, B., after consulting with the other Barons, refused the rule.

Rule refused.

ADDIS v. JONES.

Where the writ was in trespass on the case, and the particulars of demand claimed a debt, and an application was made to set aside the writ as irregular, before it appeared that a declaration had been actually filed, the Court refused a motion for setting the writ aside as being too early.

CHILTON moved to set aside a writ of summons and subsequent proceedings for irregularity. The writ was in trespass on the case, and there was no indorsement of a debt on the back. A notice of declaration was afterwards served, accompanied with particulars of the plaintiff's demand, for 7*l.*, for the plaintiff's services as parish clerk. The notice was, that a declaration had been filed; but search had been made, and no declaration could be found.

ALDERSON, B.—The writ is right at present. Must you not wait till the declaration is actually filed? Possibly there may be a declaration which will correspond with the writ.

Chilton.—They must be bound by the particulars delivered, which shew that the action must be either in *assumpsit* or debt. The notice of declaration is at all events wrong.

Lord LYNTHURST, C. B.—They appear to be following up the writ irregularly; but it cannot be said that the declaration will be variant from the writ till it is actually filed.

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A rule *nisi* to set aside the notice of declaration was then granted.

GRANT'S Bail.

THIS was a case of country bail, and stood over from a previous day, to enable one of the bail to explain respecting a mortgage which it was alleged existed upon the property specified in the affidavit. A satisfactory affidavit being now produced—

Upon the justification of bail in a country cause, one of the bail was allowed time to explain respecting some property which it was alleged was mortgaged: this being afterwards done--*Held* that the defendant was entitled to the costs of justification.

Hamfrey applied for costs.

Busby, contra, contended that the rule as to costs did not apply to country bail.

GURNEY, B., after consulting the Master, said, that the rule applied equally to country bail as to town bail, and allowed the costs.

See Shaw v. Owen. 25. L.J.C.P. 42.

PACKHAM v. NEWMAN.

L.C.J. 31. 1834 & L.J.C.P. 504.

THIS cause was tried before the sheriff of *Sussex*, under the Writ of Trial Act. After the jury were sworn, the defendant's attorney applied to have the trial put off, on account of the absence of a material witness. The

Where application to put off a trial before the under-sheriff was made after the jury were sworn, on the ground of the absence of a

material witness, and refused, the Court would only grant a new trial on payment of costs.

Quare, whether the under-sheriff, under the Writ of Trial Act, has power to postpone a cause, or whether the application must not be made to a Judge?

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 }
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under-sheriff refused to put off the trial, thinking he had no power to do so, and a verdict passed for the plaintiff.

Clarkson now moved for a new trial, contending that the under-sheriff was invested with the same power as a Judge at *Nisi Prius*, and ought to have put off the trial.

LYNDHURST, C. B.—Application to put off the trial ought to have been made before the jury were sworn, and therefore you may have a rule for a new trial, but only on the terms of payment of costs.

Humfrey, on a subsequent day, shewed cause, and contended that the application to the under-sheriff was too late.

Clarkson.—It may be doubtful whether the sheriff has power to postpone.

ALDERSON, B.—His remedy was by applying to a Judge.

There was an affidavit of a good defence on the merits, and the Court made the rule absolute on payment of all the costs.

Rule absolute, on payment of costs.

COPPELO v. BROWN.

The indorsement on a writ that the plaintiff claims a sum for debt, with interest thereon, from a certain day, is sufficiently certain.

KNOWLES moved to set aside a bail-bond, on the ground of a defect in the indorsement on the writ of *capias*. The indorsement was in these terms: "The plaintiff claims 20*l.* 4*s.* 6*d.* for debt, *with interest thereon from the 10th day of March last*, and 3*l.* for costs; and if the amount thereof be paid, &c. (in the usual way). He

contended that the amount of the debt was not sufficiently specified, as the defendant might be at a loss to know what to pay (a).

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COFFELO
v.
BROWN.

LORD LYNTHURST, C. B.—I think it is sufficiently certain.

PARKE, ALDERSON, and GURNEY, Barons, concurred.

Rule refused.

(a) It had been the practice of some Judges at Chambers to discharge defendants on this ground.

COOPER v. WALLER. TABRAM v. THOMAS.

IN the first of the actions, *J. Jervis* applied for a rule *nisi* to have the bail-bond given up to be cancelled, with costs, on entering a common appearance, on the ground of an irregularity in the indorsement on the *capias*, which was in this form: "The plaintiff claims 7*l.* for debt, and 3*l.* 3*s.* for costs; and if the amount thereof be paid to the plaintiff or his attorney, within four days from the arrest hereof, further proceedings will be stayed."

An irregularity in the indorsements on writs required by the rules of Court is no ground for setting aside the writ itself or for cancelling the bail-bond, if the plaintiff, upon notice of the objection, amends the defect, on payment of costs; but the defendant is to be allowed four days' further time after the amendment to pay the debt.

In the second action, a similar motion had been made by *Barstow*, on the ground of a defect in the indorsement of the writ, the word "execution" having been substituted for "service."

PARKE, B., after observing that the indorsement was not required by the act of Parliament (a), but only by a

(a) 2 Will. 4, c. 39.

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rule of Court (a), said, he thought it would be proper to consult the Judges of the other Courts, in order that some uniform rule should be adopted in disposing of the numerous applications occasioned by mistakes in the indorsements required by the rule of Court; and that both motions should therefore stand over till the following day; when his Lordship said, that he had conferred with the Judges of the other Courts, and they thought it proper that the plaintiffs in these cases should have leave to amend, and that they should be allowed to shew the amendments as cause against the rule for setting aside proceedings, which would be accordingly discharged upon payment of costs, the defendant being allowed four days from the time of the amendment to pay the debt. It was recommended by the Court that notice to this effect should be given to the opposite party, and that no further proceedings should be had if they would take out a summons to amend, and pay the defendant his costs occasioned by the irregularity up to that time; but, if he refused to do so, then the rule as prayed was to be drawn up.

(a) R. H. 2 Will. 4, s. 2, continued by 5 Reg. Gen. M. T. 3 Will. 4.

TOWNSEND v. GURNEY.

The improper introduction of a venue into a declaration, contrary to the rules of *H. T. 3 & 4 Will. 4, c. 42*, is no ground for setting aside the declaration, the proper course being to apply to a Judge at Chambers to strike it out.

KNOWLES applied to set aside a declaration, because the venue had been improperly introduced into the declaration, contrary to the late rule of *H. T. 3 & 4 Will. 4, c. 42, s. 8*.

GURNEY, B.—I think that is no ground for setting aside the declaration. You may apply at Chambers to have the unnecessary matter struck out.

Rule refused (a).

(a) See *Harper v. Champneys*, ante, Vol. 2, p. 680.

1834.

LAMBERT v. WRAY.

HUMFREY moved to discharge the defendant out of custody on entering a common appearance, on the ground of a defect in the affidavit to hold to bail. The affidavit was made by the plaintiff, and stated that *Thomas Wray* (the defendant) was justly and truly indebted to the deponent in the sum of 250*l.* and upwards, upon and by virtue of a certain indenture made between &c., whereby the said *Thomas Wray* did covenant and agree that the said *Thomas Wray* and his wife, his executors, &c., or some or one of them, should and would well and truly pay or cause to be paid unto the deponent the said sum of 250*l.*, with lawful interest for the same at the rate of 5*l. per centum per annum*, at a time now past. He objected that the affidavit did not negative that the money was paid on the day it ought to have been, nor was it averred that it still remained due, or that there had been a breach of the covenant.

An affidavit of debt on a covenant in a deed for payment of a certain sum at a particular day, which is sworn to have passed, and that the defendant is indebted to the amount is sufficiently positive, though it is not in terms alleged, that the money was not paid at the day appointed.

PARKE, B.—It is sworn that the time for payment has elapsed, and how could the defendant be indebted if the money was paid? I think the affidavit is sufficiently positive.

ALDERSON and GURNEY, Barons, concurring—

Rule refused.

1834.

POPRJOY'S Bail

If bail are opposed on the ground of the affidavit of justification being defective in not swearing that they are "worth" the requisite amount; but it appears that the bail are, in fact, sufficient, and afterwards justify, the defendant will not receive the costs of justifying bail, but he will not pay the costs of opposing.

C. JONES opposed bail, on the ground of the affidavit having the word "possessed" instead of "worth." He contended, that, as the affidavit was insufficient, he would be entitled to costs, though the bail should prove to be sufficient.

R. V. Richards, contrà, produced a fresh affidavit, in which the bail were sworn to be "worth" the requisite amount.

PARKE, B.—The consequence will be, that you will not receive costs even if the bail are sufficient in other respects. You will not pay costs.

The bail then justified without further opposition.

PROBERT v. ROGERS.

The mere fact of a *præcipe* not being to be found, is no ground for setting aside proceedings to outlawry, if it is sworn that a *præcipe* was at one time left in the office.

Where a plaintiff proceeded against a defendant here and in

America for the

same cause of action, and the defendant was arrested in *America*, and took the benefit of the Insolvent Act here, the Court would not, on that ground, set aside the proceedings to outlawry which had been taken here, but left the defendant to plead these facts, it being sworn that he went abroad to avoid his creditors.

F. POLLOCK shewed cause against a rule which had been obtained by **R. V. Richards** for setting aside the *alias capias* and proceedings to outlawry, with costs. One ground of the motion is, that there was no *præcipe*. The defendant swears he has searched and could not find any; but it is positively sworn on the other side, that a *præcipe* was left in the office, though it may not be there now. The other objection is, that we outlawed him when we knew he was in *America*; but it is positively sworn that he went abroad to avoid his creditors.

R. V. Richards, in support of the rule.—The plaintiff proceeded against the defendant in this country at the very time he was taking proceedings against him in *America*, where he was arrested and took the benefit of the Insolvent Act. The Court, therefore, ought to relieve him in a summary way, as he could not plead those facts, as they occurred after the action was commenced.

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PARKE, B.—If it is any defence at all, satisfaction after action is brought could be pleaded. The rule can only be absolute on payment of all costs, and putting in bail or rendering.

Rule absolute accordingly.

PEATE v. DICKENS.

THIS was an action on a promissory note made by the defendant. The defendant pleaded several special pleas, the purport of which was, that one *Chambers*, being indebted to the plaintiff, the plaintiff's attorney and the defendant's attorney had met upon the subject, and came to an arrangement on behalf of their respective clients, and, amongst other stipulations, the defendant agreed to become responsible for part of the debt due to the plaintiff, for which the note was given, the plaintiff agreeing to give further credit to *Chambers*, &c. It was then averred, that the note was given on a *Sunday* in pursuance of the agreement entered into on that day by the defendant as attorney for his client, and in the way of his business and calling, with the attorney for the plaintiff. The plaintiff demurred.

An attorney is not within the 29 Car. 2, c. 71, s. 1, which prohibits certain persons from doing any work of their ordinary calling on the Lord's day. An attorney, who acting on behalf of his client, agrees to become personally responsible for part of the debt owing by him, does not thereby do any work of his ordinary calling within the meaning of that act.

R. V. Richards, in support of the demurrer, contended that the pleas were bad in point of form, because they did not aver that what was done was *contra formam*

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statuti, or that the plaintiff was cognizant of the way in which the agreement was made. It has never been decided, that an attorney is within the operation of the act, which was described, in *The King v. The Inhabitants of Whitnash* (a), as a highly penal one, and to be construed strictly. Upon the first point he referred shortly to *Wells v. Iggulden* (b), *Lee v. Clarke* (c), *Earl Clanricarde v. Stokes* (d), *The King v. Southerton* (e), and *Begbie v. Levi* (f).

PARKE, B.—By this agreement the defendant, an attorney, agrees to make himself personally liable. We can take notice of what the business of an attorney is; but how can we say that it is part of the business of an attorney to enter into an agreement by which he makes himself personally responsible?

Justice, in support of the pleas, was then called on by the Court.—He contended that, as it appeared that the defendant and the plaintiff's attorney were acting as solicitors for their respective clients, what they did must be considered as done in the course of their business or ordinary calling, and that it was the ordinary business of an agent to settle matters for his principal; and that the note was thereby avoided, as being contrary to the 29 Car. 2, c. 7, s. 1. He relied upon *Fennell v. Ridler* (g), and particularly *Smith v. Sparrow* (h), where it was held, that an action will not lie on a contract entered into on a Sunday, although entered into by an agent, and although the objection is taken by the party at whose request the contract was entered into. Mr. Justice Park there says, "the ex-

(a) 7 B. & C. 596, 602.

(b) 3 B. & C. 186.

(c) 2 East, 333.

(d) 7 East, 516.

(e) 6 East, 126.

(f) 1 Cr. & J. 106.

(g) 5 B. & C. 406.

(h) 4 Bing. 84; 2 C. & P. 544, S.C.

pression 'any worldly labour' cannot be confined to a man's ordinary calling, but applies to any business he may carry on, whether in his ordinary calling or not. The act of the agent must be esteemed the act of the party. The statute, being designed for the support of the religion of the country, ought to receive an extended construction." Here both attorneys met, and transacted business for their respective clients.

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LORD LYNTHURST, C. B.—It has never been held that an attorney is within the act. The present transaction is something *ultra* the ordinary calling of an attorney.

ALDERSON, B.—The words of the act are, "that no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly business, or work of their ordinary calling, upon the Lord's day." Those words only apply to persons *ejusdem generis*. But this is an undertaking to pay out of the attorney's own pocket; it is not his client who is to pay, but the defendant makes himself personally liable; that is not at all like the ordinary business of an attorney.

PARKE, B.—It was expressly held in *The King v. The Inhabitants of Whitnash* (a), that the act only applies to persons *ejusdem generis* with those mentioned in the act; and there is nothing to shew on the face of the pleas, that the plaintiff was cognizant of the circumstance that his attorney had taken the note on the *Sunday*.

Justice then took objections to the declaration.

The Court gave judgment for the plaintiff.

Judgment for the plaintiff.

(a) 7 B. & C. 596.

1834.

REX v. The Sheriff of SURREY in a Cause of
WESTON v. WOODS.

On a notion for setting aside an attachment against the sheriff on terms, the affidavit ought to state at whose expense the motion is made.

THIS was a rule which had been obtained by *C. Jones*, for setting aside an attachment on payment of costs.

Greaves shewed cause, and objected that the affidavit was insufficient, in not shewing at whose expense the motion was made. He cited *Price's Practice*, p. 157, where the form is given, and also the rule of *Mich. K. B. 59 Geo. 3 (a)*.

C. Jones was heard in support of the rule.

Lord LYNDHURST, C. B.—It ought to have stated at whose expense it was made: it is better not to deviate from the established form.

Rule discharged (*b*).

(*a*) 2 B. & Ald. 240.

(*b*) See *Rex v. Sheriff of Middlesex*, ante, Vol. 2, p. 286.

HODSON v. GAMBLE.

A plaintiff, being called upon for his place of residence, gave *Peel's Coffee House, Fleet Street*:—Held not sufficient, and proceedings were stayed till he gave a better place of residence.

THIS was a rule obtained by *Follett* on behalf of the defendant, calling on the plaintiff to shew cause why proceedings should not be stayed till he had given security for costs, or his place of residence. The affidavit, on which the motion was made, stated that the plaintiff had arrested the defendant, the defendant having at that time a larger claim against the plaintiff, who had left his place of residence and gone to *Liverpool*; that he was in great distress there, and represented that he was about to go to *Sydney* to settle.

Godson shewed cause, upon an affidavit, that the plaintiff was residing at *Peel's Coffee House, Fleet Street*, and that he was not going to settle abroad, but was about to engage in mercantile speculations.

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GAMBLE.

Follett, in support of the rule, contended that *Peel's Coffee House* was not a sufficient residence for the plaintiff to give, he ought to have a house or place of business, or give security for costs. It is sworn that we made inquiries about him a few weeks ago, and were informed that he had been discharged by a sheriff's officer half an hour before. The plaintiff arrested the defendant for the whole of his debt, and the defendant has been advised to arrest the plaintiff for a cross demand due to him of 400*l.*, which exceeds the plaintiff's demand. We have been unable to find him or to serve him with process, and the plaintiff's attorney has refused to accept process for him, or to allow a general reference of all matters in dispute, which the defendant proposed.

GUERNEY, B. (a)—I do not think the defendant is entitled to have security for costs, as the fact of the plaintiff's going out of the country to settle is contradicted; but he is entitled to ask for a better residence than *Peel's Coffee House*; and therefore all proceedings will be stayed till a better residence is given, and no costs on either side.

Rule absolute accordingly.

(a) Sitting alone.

1834.

HARGRAVE v. HOLDEN.

Where the plaintiff signed an irregular judgment, and on the defendant taking out a summons to set it aside, he informed the plaintiff that the judgment was withdrawn:—
Held, that the defendant had no right to get an order drawn up for setting aside the judgment, and that therefore the plaintiff was liable to pay the expense of it.

THIS was a motion for setting aside an order of Mr. Baron *Bolland*, with costs. It appeared that the plaintiff had signed judgment for want of a plea. A summons was taken out by the defendant to set aside that judgment; the plaintiff's attorney finding it was irregular, (no rule to plead having been given), told the defendant's attorney, that he should not attend, for that he had withdrawn the judgment. The plaintiff's attorney not attending the summons, two other summonses were taken out, and, on the third, both parties attended before *Bolland*, B., who made an order for setting aside the judgment with costs.

ALDERSON, B.—An irregular judgment was withdrawn, and therefore the costs of the subsequent summonses to set it aside ought not to be charged.

PARKE, B.—The rule must be absolute, but without costs: no costs are allowed on setting aside a Judge's order.

Wightman, for the rule.

Follett, *contra*.

Rule absolute, without costs.

1834.

ROBINSON v. ROBINSON.

ROBINSON moved for costs of the day for not proceeding to trial.

The motion for costs for not proceeding to trial is for a rule to be absolute in four days, unless cause is shewn in the meantime.

PARKE, B.—In this Court it is not a rule absolute in the first instance, nor a rule *nisi* in the common form; but it is a rule which, if cause is not shewn in four days, makes itself absolute without any motion for that purpose.

Channel shewed cause; and the rule was ultimately referred to the Master (a).

(a) See *Raby v. Olorenshaw*, 11 Price, 512.

Re TIPTON.

BUSBY moved to discharge the applicant, who was in custody in *Gloucester* gaol on an estreated recognizance. The recognizance was to appear at the assizes on a charge of felony. He grounded his motion on the 4 *Geo. 3*, c. 10, and on certain affidavits; but it appeared that he had not given notice to the solicitor of the Treasury.

A motion to discharge a defendant from estreated recognizances, under the 4 *Geo. 3*, c. 10, must be preceded by a notice to the solicitor of the Treasury.

PARKE, B.—The practice requires you must do so before you can move.

Rule refused.

1834.

WOOLLISON v. HODGSON.

An attorney's bill having been ordered to be taxed after the client had given a bill of exchange for the amount, it was found he had been overpaid, and he was ordered to refund the overpayment to the client, and also by a subsequent order to pay the costs of taxation, more than a sixth having been taken off. Upon the application of the attorney to be allowed to pay these sums to the holder of the bill of exchange (which had been dishonoured) instead of his client, he was ordered to do so within a week, or, in default, that an attachment should issue:—

Held, that no demand of these two sums was necessary to ground an attachment, but that it was his duty to seek the holder of the bill, and pay the money to him.

A personal service of the rule of Court must be made to ground an attachment for nonpayment of money pursuant to a Judge's order, which is afterwards made a rule of Court; and service of the order and *allocatur* are not sufficient, nor is service of the rule on the *London* agents of the attorney sufficient; and for this defect an attachment, issued at the end of *January*, and executed on the 12th of *February*, was set aside in *Trinity* term following.

HUMFREY, on the 7th of *June* last, had obtained a rule *nisi* for setting aside two attachments which had issued against one *Empson* an attorney in the country, for nonpayment of two sums of money pursuant to two *allocaturs* of the Master, and for having the money refunded to Mr. *Empson*, on the ground that there had been no personal service of the rules, nor any personal demand of the money. The rule had been enlarged to this term at the instance of the defendant.

Miller shewed cause.—It appeared that *Empson*, having been attorney for the defendant, in defending the above action, had delivered his bill for business done, for which the defendant gave him a bill of exchange. The defendant then obtained a Judge's order for taxing the bill, and for having the excess refunded to him by Mr. *Empson*. The Master found that a sum of 6*l.* 15*s.* 3*d.* was due from the attorney to his client, which being more than a sixth, the plaintiff obtained another order for having the costs of taxation taxed to him, which costs were accordingly taxed by the Master at 7*l.* 9*s.* 6*d.* Those orders were made rules of Court, and, upon affidavits of a demand and refusal of the amount of both *allocaturs*, attachments were moved for. In the meantime Mr. *Empson* having paid away the bill of exchange which had been given him by his client, and the bill having been dishonoured by the defendant when it became due, application was made to the Court by Mr. *Empson* to be allowed to pay to the holder of the bill the sum which the Master found he had been overpaid, in exoneration of his liability to that ex-

tent (a); and the Court thereupon granted a rule (which was dated *January 29th*) that Mr. *Empson* should, within a week, pay to the holder of the bill the two sums of 6*l.* 15*s.* 3*d.* and 7*l.* 9*s.* 6*d.*, making together the sum of 14*l.* 4*s.* 9*d.*, or in default thereof that an attachment should issue against him. This rule was never personally served upon Mr. *Empson*, but a copy was served on his agents in *London*; neither were the two sums of money mentioned in the rule demanded of him, except on the 21st of *January*, when the two Judges' orders were served on him before they were made rules of Court. The money was not paid to the holder of the bill according to the last rule; and on the 12th of *February* the defendant was taken on the two attachments issued for not paying the two several sums of 7*l.* 9*s.* 6*d.* and 6*l.* 15*s.* 3*d.*, and costs. It was contended, that, under these circumstances, no demand or service was necessary, and that the attachments were regular.

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PARKE, B.—Upon the last rule no demand was necessary upon Mr. *Empson*, he was bound to find out the holder of the bill, and pay him the money; but can the attachment be supported without the assistance of the two rules on which the attachments were granted?

Humfrey.—It is sworn that no service of the last rule was made except on the agent, and the only service of the two former rules was on the same agent. The last rule only authorizes one attachment, and two were issued.

PARKE, B.—There must be personal service to bring a party into contempt, the rule must be absolute.

The other Barons concurred.

Rule absolute.

(a) See ante, Vol. 2, p. 351, S. C.

1834:

BRACKENBURY v. LAURIE.

Where a sheriff applied for relief under the Interpleader Act, and it appeared that he had been guilty of neglect, the Court refused to relieve him from any liability occasioned thereby.

Quære, whether the delivery of a writ to the deputy, under the 3 & 4 Will. 4, c. 42, binds the goods as if the writ had been delivered to the sheriff himself.

THIS was a rule which had been obtained by *Wightman*, under the Interpleader Act, on behalf of the sheriff of *Lincolnshire*, calling upon *John Whelpdale* and the plaintiff to appear and state their claims. The motion was made in the early part of the term.

Henderson, for the claimant, shewed cause upon an affidavit that the goods seized were the property of the claimant, having been delivered to him under a bill of sale from the defendant executed before the delivery of the writ to the sheriff, and that the sheriff took possession upon a promise of indemnity from the plaintiff. He also objected that the sheriff should have come earlier—the seizure having been on the 8th of *September*. He might have applied to extend the time for returning the writ, instead of seizing the goods.

PARKE, B.—He could not come sooner.

ALDERSON, B.—A Judge at Chambers has no power to grant relief (a).

Humfrey, for the plaintiff.—The bill of sale is dated the 2nd of *September*, the very day on which the *fi. fa.* issued. The writ was sent to Mr. *Capes*, who was generally supposed to be the *London* deputy for the receipt of writs, and acting as such for the under-sheriff under the late act (b). He, however, denied being the sheriff's

(a) See *Cook v. Allen*, ante, Vol. 2, p. 11, acc.

(b) 3 & 4 W. 4, c. 42, s. 20, by which it is enacted, that, from and after the 1st day of June, 1833,

the sheriff of each county in England and Wales shall severally name a sufficient deputy, who shall be resident or have an office within one mile from the Inner Tem-

deputy, and the writ was immediately sent to the sheriff himself, but he returned no answer till the 8th. The sheriff, therefore, has been guilty of gross neglect, and is entitled to no favour. By that act it was his duty to have had a deputy in *London* for the receipt of writs, and a delivery to him would have bound the goods, and we ought to be at liberty to try that question: no excuse is given for the delay, and the plaintiff will probably lose the benefit of his execution.

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Wightman, in support of the rule.—Every intendment ought to be made in favour of the sheriff: he has had no opportunity of answering the affidavits on the other side.

PARKE, B.—We think the sheriff is entitled to be relieved in respect of the adverse claims; but he must remain liable to the plaintiff for any loss he may have sustained by his, the sheriff's, negligence. The goods must be sold and the money paid into Court, and the sheriff will be discharged from all liability except for any negligence he may have been guilty of in executing the writ, and in not appointing a deputy according to the act.

Rule absolute without costs: the sheriff
not to be called on for a return.

ple Hall, for the receipt of writs,
granting warrants thereon, mak-
ing returns thereto, and accepting
of all rules and orders to be made

on or touching the execution of
any process or writ to be directed
to such sheriff.

1834.

JACKSON v. JACKSON.

A writ of *capias* directed to the sheriffs of *Middlesex* is irregular.

BUTT shewed cause against a rule which had been obtained by *J. Jervis*, for setting aside a writ of *capias* for irregularity, and for discharging the defendant out of custody. The writ was directed to the sheriffs of *Middlesex* instead of "sheriff." He relied on *Clutterbuck v. Wiseman* (a), where a writ, directed to the sheriff of *London*, was held not to be irregular on that account.

J. Jervis, *contra*, cited *Barker v. Weedon* (b), and *Nicol v. Boyne* (c), where writs directed to the sheriff of *London* instead of sheriffs were held to be irregular, and the Court set them aside. *Clutterbuck v. Wiseman* occurred before the Uniformity of Process Act, and was overruled by the subsequent cases.

PARKE, B.—It has been held, that the writ being given by statute must be strictly complied with.

Rule absolute (d).

PARKE, B.—The plaintiff may make an application at Chambers for leave to arrest again.

ALDERSON.—He must discontinue before he applies.

(a) 2 Cr. & J. 213; 2 Tyrw. 276, S. C.

(b) Ante, Vol. 2, p. 707.

(c) Id. 761.

(d) See *Storr v. Mount*, ante, Vol. 2, 417.

1834.

WILLIAMS v. EDWARDS.

THE issue in this action was joined on the 24th of *May*, two days before last *Trinity* Term. It was a country cause, and no notice of trial was given for the *Summer* Assizes.

Rawlinson having obtained a rule *nisi* for judgment as in case of a nonsuit—

Knowles shewed cause.—He contended that the motion was too early. The rule is, that, in a country cause, you cannot move till the third term inclusive.

Rawlinson, *contrà*, denied that there was any such rule as that three clear terms must have elapsed. But he contended, that, since the Uniformity of Process Act, which allows proceedings to go on in vacation, the old rules ought not to attach to the new mode of proceeding, as they no longer apply.

ALDERSON, B.—By the practice of the Court, the plaintiff could have taken the cause to trial.

PARKE, B.—The impression of the Court at present is, that, as there is no occasion now to enter the issue, the plaintiff should have gone on; but we will consider the point.

On a subsequent day, **PARKE, B.**, said, that the Court thought that this rule should be absolute, unless a peremptory undertaking was given. This is a country cause, and the issue was joined in the vacation before *Trinity* Term last. The rule (*a*), that an entry of the issue shall not be

The issue in this cause was joined two days before *Trinity* Term last. It was a country cause, and no notice of trial was given for the assizes; a motion, in *Michaelmas* Term for, judgment as in case of a nonsuit was held to be too early.

(a) R. H. 2 Will. 4, reg. 70.

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 {
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necessary to entitle a defendant to move for judgment as in case of a nonsuit or to take the cause down to trial by proviso, has not, we think, made any alteration in the time for moving for judgment as in case of a nonsuit, but the time remains exactly as it was before (a). The only effect of that rule is to save the necessity of taking that step (b).

(a) In this Court it was never necessary to enter the issue. *Coaltsworth v. Martin*, 2 C. & J. 123.

(b) In *Jervis's Rules*, (note to rule 69 of *H. T. 2 Will. 4*), it is said, that in a town cause the defendant cannot move for judgment as in

case of a nonsuit where no notice of trial is given until the second term after issue is joined, and in a country cause where issue is joined in an issuable term, and no notice of trial given until the term after the second assizes.

BUTTERWORTH v. CRAB TREE.

Where issue was joined in a country cause before the sheriff in *June*, and no notice of trial was given:—*Held*, that a motion for judgment as in case of a nonsuit in *Michaelmas* Term was too early, though two Court days had passed.

THIS was a motion for judgment as in case of a nonsuit. The trial had been ordered to take place in the Sheriff's Court. Issue was joined in *June*. There had been two sittings in the Sheriff's Court since. It was a country cause, and no notice of trial had been given.

Rawlinson shewed cause.—This being a country cause, the motion is too early. It was made on the assumption that the two sittings were equivalent to two assizes. The practice of the Sheriff's Court professes to be regulated by that of the superior Courts. It has never been decided, that, where no notice of trial has been given, a motion for judgment as in case of a nonsuit can be made till after the second assizes.

Alexander, in support of the motion.—The rule which

formerly applied to country causes, where a trial could only be had at the assizes, cannot apply to trials before the sheriff under the Writ of Trial Act, as these trials are not regulated by the assizes, but by the practice of the Sheriff's Court. Here there were two court days, at either of which a trial might have been had, and the plaintiff has therefore been guilty of two defaults. The case of *Mullins v. Bishop* (a) is precisely in point. There issue was joined on the 28th of April. On the 29th an order for a trial by the sheriff was obtained. In *Trinity* Term following *Patteson, J.*, granted a rule *nisi* for judgment as in case of a nonsuit, if the plaintiff did not proceed to trial in a fortnight, and the rule was afterwards made absolute. This case was moved in the hope that the Court would lay down some general rule on the subject. Here there has been a delay of several months.

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&
CHASTREE.

PARKE, B.—I do not perceive what benefit there is in driving on the plaintiff so fast as was done in that case. It is a thing done behind his back, and in nineteen cases out of twenty it is against the interest of the defendant. If this had been a common country cause, no notice of trial having been given, this motion could not have been made till after the second assizes. I think the same time ought to have been allowed here as would have been necessary in a common country cause, and that the defendant ought not to have treated the two court days as two assizes. If notice of trial be given, the plaintiff has waived his right to the full time. Here no notice of trial was given, and the motion is too early, because only one assize has passed. This rule will therefore be discharged, but without costs, as it was moved on the authority of the case cited. The Court, however, will consider whether in

(a) Ante, Vol. 2, p. 557.

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future a country cause before the sheriff should not be put on the same footing as a town cause, as both are now in effect in the same situation.

Rule discharged, without costs.

The KING v. The Sheriff of MIDDLESEX in a Case of
RIDGWAY v. PORTER.

An application to set aside an attachment may be made by one of the bail on his own affidavit denying collusion, without an affidavit from the other bail.

Where there has been a default, an attachment against the sheriff may be obtained, though the defendant is surrendered before the attachment is moved for.

Where a defendant puts in bail, but does not justify, a declaration *de bene esse* is properly *pled*, and not delivered.

MANSEE moved for a rule *nisi* for setting aside an attachment against the sheriff of *Middlesex* for irregularity. On the 4th of *September* a Judge's order was obtained for returning the writ of *capias*, to which *cepi corpus* was returned. The body rule expired on the 13th, and special bail was put in on the 15th, and on the 31st of *October* the defendant surrendered in discharge of his bail. He referred to a clause of the Uniformity of Process Act (a): "That it shall be lawful in term time for the Court, out of which any writ issued by authority of this act, or any writ of *capias ad satisfaciendum*, *fieri facias*, or *elegit* shall have issued, to make rules, and also for any Judge of either of the said Courts, in vacation, to make orders for the return of any such writ, and every such order shall be of the same force and effect as a rule of Court made for the like purpose: Provided always, that no attachment shall issue for disobedience thereof until the same shall have been made a rule of Court." And also rule 13 of *Mich. T. 3 Will. 4*, that in case a Judge shall have made an order in the vacation for the return of any writ issued by authority of the said act, or any writ of *ca. sa.*, *fi. fa.*, or *elegit*, on any day in the vacation, and such order shall have been

(a) 2 W. 4, c. 39, s. 15.

duly served, but obedience shall not have been paid thereto, and the same shall have been made a rule of Court in the term then next following, it shall not be necessary to serve such rule of Court, or to make any fresh demand of performance thereon; but an attachment shall issue forthwith for disobedience of such order, whether the thing required by such order shall or shall not have been done in the meantime. He contended, that, according to *Morley v. Cole* (a), in which it was held that a surrender of the principal before attachment obtained discharges the sheriff, although he has not taken a bail-bond, the attachment here was irregular.

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PARKE, B.—That case is no authority now: it was before the late act.

Mansel.—The defendant rendered on the 31st of October, on the same day that notice was given of a declaration being filed *de bene esse*.

A rule *nisi* having been granted for setting aside the attachment on payment of costs—

J. Jervis shewed cause.—He contended, that there ought to have been an affidavit of both the bail that the motion was made without collusion. The affidavit stated, that the motion was *bond fide* made by one of the bail. He cited *Dawson v. Cull* (b), where it was expressly held, that, in an application by bail to stay proceedings on a bail-bond, collusion with the defendant must be denied by both the bail.

Mansel, *contra*, stated, that there had been a decision in this Court since that case, that an affidavit by one only was sufficient.

(a) 1 Price, 103.

(b) 2 Cr. & J. 671.

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 MIDDLESEX.

PARKE, B.—I doubt the authority of the case of *Dowson v. Cull*. It would be a very great hardship that one bail should suffer by the fraud of the other.

J. Jervis.—The plaintiff having lost a trial, the attachment must stand as a security. There was a declaration *de bene esse* on the 24th of *October*. The bail were put in after the time for putting in bail had expired, and therefore it was a mere nullity unless they justified.

Mansel.—Bail being put in, the declaration ought to have been delivered *de bene esse*, and not filed.

PARKE, B.—If the declaration had been delivered, the defendant must have been in Court. The notice of declaration did not waive the justification. The only question is, whether they could have gone on on that declaration? Bail being out of time, the declaration was properly filed *de bene esse*. It must be referred to the Master to say whether the plaintiff could have gone to trial, and, if he could, the attachment will be set aside on payment of costs, the attachment standing as a security or not according as the Master finds that a trial has or has not been lost.

Rule accordingly.

BALL v. HAMLET.

It is no objection to an issue that the form of action is not inserted therein.

BOMPAS, Serjt., moved for a rule to shew cause why the issue in this action, and the notice of trial indorsed thereon, should not be set aside for irregularity. There were two objections:—*First*, that the issue on the face of it did not state the form of action, as whether it was on promises, or in debt, &c.; and, *secondly*, that there was no date to the issue.

PARKE, B.—The form of issue is given by the rule (a), which does not direct the form of action to be inserted, nor is it required by the form. I think it is unnecessary, and ought not to be inserted. Upon the other objection you may take a rule.

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Rule accordingly.

(a) H. T. 4 Will. 4, ante, Vol. 2, p. 327.

GURNEY and Others v. HOPKINSON.

THIS was a motion to set aside a writ of *capias*, on the ground of its not being according to the form given by the Uniformity of Process Act. The action was described in the writ to be an action of trespass on the case upon promises. It appeared, that, on the 18th of *June* last, an application had been made to Mr. Baron *Bolland* to discharge the defendant out of custody for the same objection, and that the learned Baron refused to interfere. A bail-bond was then given, and on the 27th the notice of special bail was given; but, as the time for putting in bail expired on the day previous, the plaintiff took an assignment of the bail-bond, upon which an action had since been commenced, and the bail had pleaded to that action, that no writ, on which the defendant could or ought to have been arrested, was ever issued out of the Court of *Exchequer*. On the 26th of *July*, a summons was taken out to allow the plaintiff to treat the plea as a nullity and sign judgment, but it was dismissed, leaving the plaintiff at liberty to apply to the Court. The present application

A defendant being arrested on a writ, which stated the action to be trespass on the case upon promises, an application was made by the defendant to a Judge to be discharged, on the ground that the form of action was misdescribed, but it was refused. He then gave a bail-bond, and special bail not having been put in in due time, the plaintiff took an assignment of the bail bond and proceeded upon it. The bail, having taken out summonses to stay proceedings without success, applied to the Court to

set aside the *capias* against the original defendant: the Court refused to interfere.

A writ of *capias* to answer the plaintiff in an action of *trespass on the case* upon promises is merely irregular and not void, and a defendant, to avail himself of the objection, must apply in proper time.

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was by the bail, who swore that it was truly made for their relief, and without collusion. It was made on the third day of term, and on the same affidavit, and for the same objection which was heard before Mr. Baron *Bolland*. It was contended, that, though the defendant might, if the objection was a good one, have applied to set aside the writ, the bail were not at liberty to avail themselves of it. The irregularity is not in the process against themselves, but against the principal. It was denied, however, that it was an irregularity, as the act did not abolish the action of trespass on the case.

ALDERSON, B.—It has been held you must follow the words of the writ as given by the act.

Busby.—The bail have precluded themselves from taking the objection: they took out a summons to stay proceedings in the action against them on payment of costs, and afterwards two other summonses to stay proceedings, because the bail-bond was put in suit too soon.

Hoggins, contra.—The plea does not raise this point. It merely says, that there was no writ in which the defendant could be held to bail. Why should not the bail be allowed to apply on such an objection? Suppose a void writ?

PARKE, B.—That might be pleaded.

Hoggins.—They ought to be at liberty to take advantage of a minor objection. Where the defendant could obtain relief, the bail ought to be able to do so too.

PARKE, B.—The objection is, that the bail came in and voluntarily interfered to appear to the writ. A defendant acts *in invitum*. The bail are volunteers. If the writ is

void, the bail are not deprived of the means of obtaining relief. The rule must be discharged.

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Rule discharged with costs, to be paid by the bail.

ON a subsequent day in the term the action by the plaintiffs, as assignees of the bail-bond, against the bail, came on to be tried, and the plaintiffs obtained a verdict.

Theisiger moved to set aside the verdict, and enter a verdict for the defendant. Upon the writ of *capias* against the original defendant being put in at the trial, to prove the issue that a writ had been issued against the original defendant, upon which he could and ought to have been arrested, the objection was again taken to it, that it was to answer the plaintiff in an action of trespass on the case upon promises; and it was urged, that, since the Uniformity of Process Act, there was no such form of action as that stated in the writ, and that therefore the defendant had been improperly held to bail upon it. The objection was overruled. In support of the objection, sect. 4 of the Uniformity of Process Act (a) was now relied on, which directs, "that in all actions, wherein it shall be intended to arrest and hold any person to bail, the process shall be by writ of *capias*, according to the form contained in the schedule marked No. 4," that form describes the action to be an "action on promises," [or "of debt," &c.]; and in the case of *King v. Skiffington* (b) a writ similar to the present was set aside as irregular. There *Bayley*, B., said, "The act of Parliament has stated, in specific terms, that the writ shall be in a given form; that form, as applicable to

(a) 2 W. 4, c. 39.

(b) Ante, Vol. 1, p. 686; 1 C. & M. 363, S.C.

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the action of *assumpsit*, is in an action on promises. It seems to me to be better to adhere to the strict form.

ALDERSON, B.—It is not doubted that such a writ is irregular; the question here is, whether it is void. Have you looked at the rule on that subject?

PARKE, B.—The Uniformity of Process Act (a) gave power to the Judges from time to time to make such rules and orders for the effectual execution of the act and the intention and object thereof, as they might think fit. In pursuance of the act the Judges made an order (b), that, if the plaintiff or his attorney shall omit to insert in or indorse on any writ or copy thereof, any of the matters required by the said act to be by him inserted therein, or indorsed thereon, such writ, or copy thereof, shall not on that account be held void, but may be set aside as irregular, upon application to be made to the Court out of which the same shall issue, or to any Judge. Here the attorney has omitted to insert in the writ the *true* nature of the action.

Thesiger.—The question is, whether the defendant can be held to bail on such a writ. I submit that that rule does not apply to the present case; the informality here is in the body of the writ. The rule appears merely to refer to an omission or mistake in those directions which are given by the 12th sect. of the act; and the way in which the rule is printed in *Jervis's Rules*, (with a reference to sect. 12 of the act, and the forms of indorsement and memorandums, as given in the schedule at the end), seems to shew that it was the opinion of the author that the rule only referred to such matters.

(a) Sect. 14.

(b) Reg. Gen. M. T. 3 W. 4, s. 19.

ALDERSON, B.—The act requires the form of action to be inserted in the writ, and here it has been omitted.

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PARKE, B.—The attorney has not put in the right form of action. It is clearly an irregularity only, and, not having been taken advantage of in proper time, the bail-bond was rightly taken. I am very glad we are able to defeat this objection. Nothing will be taken by the motion.

Rule refused.

ANSELL v. SMITH.

TO a declaration in *assumpsit* the defendant pleaded, as to 14s. parcel &c., that, before the commencement of the suit, he paid the same to the plaintiff, and, as to the residue of the said monies, that he did not promise as in the declaration is alleged, and of this he puts himself upon the country. The plaintiff demurred specially, assigning for cause that the plea was double, and ought to have concluded with a verification.

In *assumpsit* the defendant pleaded as to 14s. parcel, &c., that before the commencement of the suit he paid the same to the plaintiff; and, as to the residue of the said monies, that he did not promise as in the declaration is alleged, and of this he puts himself upon the country. The plaintiff having specially demurred, alleging duplicity, and the want of a proper conclusion with a verification, the Court held the plea bad, and that judgment for the plaintiff must be upon the whole plea.

Dundas, in support of the demurrer, contended, that, as the plea introduced new matter, it ought to have concluded with a verification; that the payment alleged might have been before the commencement of the suit, but after the contract was broken; and that what was intended to have been two distinct pleas, were confounded together into one.

PARKE, B.—The plea does not say that the 14s. were accepted in satisfaction. In the mode in which it is pleaded, it would exclude a replication that the money was not paid when it became due. It is quite consistent with

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the plea, that the contract may have been broken, and yet the defendant may not have paid the money on request.

Mansell, in support of the plea, contended that the demurrer was at all events too extensive, as the general issue to all except the 14s. was properly pleaded. He referred to a case of *Chapman v. Hicks (a)*, where, in an action of debt, the defendant pleaded the general issue as to part, and as to the other part a tender, but omitted to pay the money into Court: judgment having been on that account signed as for want of a plea, the Court set aside the judgment for irregularity.

PARKE, B.—Here it is an entire plea. The whole is pleaded as one plea: there is one demurrer to the whole, and therefore there must be judgment on the whole plea, unless the defendant amends.

Judgment *nisi* accordingly.

(a) Ante, 641.

The KING v. The Sheriff of MIDDLESEX, in a Cause of
FINLAY v. RALLET.

Where the writ was returnable on the 22nd, and the plaintiff did not declare *de bene esse* till the 30th, the Court, on setting aside an attachment against the sheriff on payment of

costs, refused to order the attachment to stand as a security, it not appearing that the plaintiff had lost a trial. It lies on the plaintiff in such a case to shew that he has lost a trial. The affidavit of the officer need not deny collusion with the bail, nor need the bail deny collusion with the officer.

CRESSWELL shewed cause against a rule which had been obtained by *R. V. Richards* for setting aside an attachment against the sheriff of *Middlesex*, and all subsequent proceedings, on payment of costs. The *capias* issued on the 17th of *May*, upon which the defendant was arrested on the 22nd; on the 24th a bail-bond was given;

on the 30th the plaintiff declared *de bene esse*; no notice of bail was given till *August* the 25th, and on the 26th the defendant surrendered in discharge of his bail. He objected to the affidavits on which the rule was obtained; that of the sheriff's officer merely stated that the application was made on his behalf without collusion with the defendant, but it did not deny collusion with the bail: the bail also made an affidavit, but they did not deny collusion with the officer. The attachment, he insisted, ought to stand as a security.

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Richards appeared for the bail, and *Lumley* for the officer. The writ being returnable on *May 22nd*, it was too late, they contended, to declare conditionally on the 30th. The rule respecting the affidavit (*a*) merely says, that it shall shew that such application is really and truly made on the part of the sheriff or bail, or officer of the sheriff (as the case may be), at his or their own expense, and for his or their only indemnity, and without collusion with the original defendant. It does not appear that a trial has been lost.

PARKE, B.—The affidavit is right. I cannot say that the plaintiff has lost a trial; it lies upon him to shew that he has. The rule will be absolute on payment of costs, without the attachment standing as a security.

The other Barons concurred.

Rule absolute accordingly.

(*a*) R. Mich. T. 59 Geo. 3.

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SEALY v. HEARNE.

A writ indorsed in this form—
“The plaintiff claims 50*l.* for debt with interest from the 25th of *May* last, and 2*l.* for costs.”—*Held*, regular.

PLATT shewed cause against a rule which had been obtained, calling upon the defendant to shew cause why an order of *Bolland*, B., for setting aside the writ in this action for irregularity should not be discharged, and the costs be costs in the cause. The objection was to the indorsement of the debt and costs on the writ; it was in this form—“The plaintiff claims 50*l.* for debt with interest from the 25th of *May* last, and 2*l.* for costs.” It was now contended that the indorsement was bad for uncertainty; for, supposing it was said that the defendant when he was arrested in this case had offered the officer 50*l.* and costs, would the officer have been justified in discharging him if he refused to pay the interest? The officer might think he was entitled to detain him till it was paid.

PARKE, B.—I think he would have no right so to do. It appears to me that the indorsement is perfectly correct, and that there is no other way of doing it.

Rule absolute.

COOPER v. PHILLIPPS.

To a declaration in *assumpsit*, the defendant pleaded as to all except 20*l.* 9*s.* *non assumpsit*; and as to that sum, that the defendant being in

THIS was a demurrer to a plea to a declaration in *assumpsit*. The plea was as follows:—

And the said defendant, by *S. A.* his attorney, as to the said supposed promises in the said declaration mentioned, except as to the sum of 20*l.* 9*s.*, parcel of the said

embarrassed circumstances, the plaintiff and other creditors agreed to take 5*s.* in the pound, and that the defendant was ready and willing to pay the amount of the composition, but the plaintiff refused to receive it, and discharged the defendant from payment of it:—*Held*, that the plea was no answer to the sum agreed to be taken for composition, because no consideration was stated for the plaintiff's discharging the defendant from paying it, and that therefore the agreement as to that was void. The plea was allowed to be amended by paying that sum into Court.

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monies in the said declaration mentioned, saith, that he did not promise in manner and form as the plaintiff hath above thereof complained against him, and of this the defendant puts himself upon the country, &c. And as to the said sum of 20*l.* 9*s.*, parcel of the said monies in the said declaration mentioned, the defendant says, that, after the making of the said supposed promises in the said declaration mentioned as to the sum of 20*l.* 9*s.*, and before the commencement of this suit, to wit, on &c., the defendant was in bad and embarrassed circumstances, and indebted to the plaintiff in the said sum of 20*l.* 9*s.*, parcel &c., and to divers other persons respectively in divers large sums of money, and was unable to pay the said plaintiff, and the said other creditors of the defendant respectively, their debts in full, whereof they then had notice, and thereupon the defendant then offered and agreed with the plaintiff and the said other creditors of the defendant to pay to them respectively, and the plaintiff and the said other creditors then mutually agreed with each other and with the defendant to accept of him 5*s.* in the pound as a composition upon and in full satisfaction and discharge of their said respective debts, such composition to be paid by the defendant to the plaintiff and the said other creditors of the defendant respectively as follows, to wit, half thereof down, and the remainder, divers, to wit, six months then following, and the plaintiff and the said other creditors of the defendant then mutually agreed with the defendant not to proceed against the defendant for the recovery of the residue of the said respective debts and demands, unless default should be made in payment of such composition. And the said defendant further saith, that the composition or sum of 5*s.* in the pound on the said sum of 20*l.* 9*s.* amounts to a large sum, to wit, the sum of 5*l.* 2*s.* 3*d.*; and that he, the said defendant, at the time of the making of the said agreement in the plea mentioned, and always from thence hitherto, hath been and still is ready and willing to pay to the said plaintiff the said

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composition on the said sum of 20*l.* 9*s.*, parcel &c., but to receive the same or any part thereof of the defendant he, the said plaintiff, hath always wholly refused; and the plaintiff then discharged the defendant from tendering or paying to him the said plaintiff the said composition at the times for payment thereof, or at any other time, and this the defendant is ready to verify, &c. Demurrer and joinder.

W. H. Watson, in support of the demurrer, contended, that, if the agreement could be pleaded, it should have been pleaded as accord and satisfaction, and the plea should have averred an acceptance by the plaintiff. The plea is pleaded to the 20*l.* 9*s.*, instead of the 20*l.* 9*s.* *minus* 5*l.* 2*s.* 3*d.*

PARKE, B.—The effect of the plea is, that the debt is reduced to 5*l.* 2*s.* 3*d.*

Ross, in support of the plea.—The plea is payment of a smaller sum in satisfaction of a greater. The plaintiff has commuted his claim of 20*l.* 9*s.* for 5*l.* 2*s.* 3*d.*

PARKE, B.—Could not the plaintiff recover for goods sold and delivered, notwithstanding the agreement, or on an account stated? If he could recover on an account stated, you have not answered the whole. There is no answer as to 5*l.* 2*s.* 3*d.*; the only answer to that is, that the plaintiff discharged you from paying it. There being no consideration stated for discharging you from the 5*l.* 2*s.* 3*d.* the agreement is void.

ALDERSON, B.—The plaintiff revokes the agreement by bringing an action.

PARKE, B.—You may amend your plea, and pay the 5*l.* 2*s.* 3*d.* into Court on an affidavit of merits.

Judgment for the plaintiff, with liberty to the defendant to amend.

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JUPP and Others v. GRAYSON.

MANSEL moved to set aside an award on two grounds, *first*, that the award was not final; and, *secondly*, that there was no evidence that the plaintiffs were partners, or entitled to maintain the action jointly. By the reference two actions between those parties were referred by an order of a judge to a non-legal arbitrator. The costs of the suits and reference were to abide the event of the award. The arbitrator awarded of and concerning the first action, that there was and still remains due from the defendant to the plaintiff 8*l.* 10*s.* 3*d.*, and directed that the defendant should pay that sum to the plaintiff, who should accept it in full satisfaction; and, as to the second action, he awarded that the defendant should pay to the plaintiff 40*s.* Nothing was said about costs. It was contended that a verdict should have been ordered to be entered, and that costs would then have followed the judgment; but at present there was no verdict, as it was not a reference by an order of *Nisi Prius*.

Where a mixed case of law and fact is referred to a non-legal arbitrator, and he decides absolutely upon them without raising any question upon his award, his decision is final, and the Court will not entertain a motion for reviewing such decision either as to the facts or the law.

PARKE, B.—This arbitrator has no power over costs. The event of the award being in favour of the plaintiff, the costs follow as of course.

ALDERSON, B.—The other question is not raised by the arbitrator, and therefore it is not open to you to take the objection.

Mansel, contra, cited *Ashton v. Poynter* (a), where a distinction was taken between a legal and non-legal arbitrator; that, upon a submission to a legal arbitrator, you are concluded both upon the law and the facts; but where the reference is to a non-legal arbitrator, it is open to parties to

(a) Ante, Vol. 2, p. 651, not then published.

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take legal objections. Here the objection was taken before the arbitrator that the plaintiffs were not the proper parties to the action, and he was asked to raise the question on the award; but, from a letter since received from the arbitrator, it appears that he declined to notice the objection, because he had been advised that he could not write the objection on the award. He then stated the objection to the Court.

ALDERSON, B.—The arbitrator might have stated the objection on a separate paper; there was no necessity for writing it on the award. In a case which occurred last term, I certainly thought the distinction between a legal and non-legal arbitration well founded; but I have since had occasion to consider the point, and have altered my opinion. If a party submits a mixed case of law and fact to an arbitrator, it matters not whether he is a legal person or not; he is equally selected as your own judge, and as a final judge. Lord *Ellenborough* has frequently expressed an opinion adverse to the present motion.

PARKE, B.—I know of no case which has decided, that, where law and facts are submitted to a non-legal arbitrator, you can afterwards object to his decision. It has been frequently held, that, if you refer to a legal arbitrator, you cannot move; and I know no reason for any distinction, for the arbitrator in either case is equally selected for a judge final. Upon this particular case, it appears to me that the arbitrator has done substantial justice.

Lord LYNTHURST, C. B.—There is no ground for a rule. The whole question was submitted to the arbitrator, and he has decided it. There is no reason for a distinction between a legal and non-legal arbitrator.

GURNEY, B., concurred.

Rule refused.

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ASHTON v. POYNTER.

ALEXANDER and *Butt* shewed cause against this rule, which was obtained by *Kelly* last *Easter Term* (a), but which had stood over till now. It was obtained on the ground that the arbitrator had decided contrary to law, as to a sum of 8*l.* All matters in difference were submitted to a gentleman not of the bar, and after sixteen meetings they awarded 8*l.* to be paid to the defendant by the plaintiff. The expense of the award was 160*l.* They contended, that the defendant was not in a condition to take the objection, as there was no question of law raised by the arbitrator, either on the award or on any contemporaneous paper. It did not appear, it was said, that there was any point of law before the arbitrator. The arbitrator acted on the evidence before him, and drew his conclusion from those facts in favour of the defendant; the Court, therefore, will not now investigate as to the correctness of the umpire's conclusion, unless there is something to induce a suspicion of corruptness, which the affidavits do not shew. They referred to *Jupp v. Grayson* (b) in this term, which determined that the decision of an arbitrator, whether legal or not, is final.

The decision of an arbitrator (though not a barrister) is final, though it can be clearly shewn that his award is founded on a misapprehension of law.

Kelly, in support of the rule.—This rule was moved for on the ground that the award having been made by two gentlemen not of the bar, this Court could examine into the correctness of the decision. If I am allowed to go into the point, I could clearly shew that the law has been grossly mistaken as to 8*l.*, which have been awarded to be paid by the plaintiff to the defendant; but if it is to be considered as finally settled, that in no case can an award referred generally to a non-legal arbitrator be impeached, however erroneous the award may be both in fact and in law, I will not discuss the point further.

(a) Ante, Vol. 2, p. 651.

(b) Ante, p. 199.

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PARKE, B.—I am at a loss to find any ground for the distinction which is endeavoured to be taken between a reference to a legal arbitrator and a non-legal arbitrator; and that an award made by the latter may be impeached on a point of law, though an award by the former cannot. To support that distinction you must infer that both parties intend that the arbitrator should decide according to law, when they know that he has no knowledge of law; but the point has already been determined in *Jupp v. Grayson*.

ALDERSON, B.—Before the last vacation I thought that a distinction existed; but I have since looked more fully into the cases, and have found reason to alter my opinion. The point was expressly decided by Lord *Eldon* in *Ching v. Ching (a)*, where, upon a general reference of all matters in dispute to a clergyman, a motion being made to set aside his award on the ground that he had made a wrong decision on a point of law, the Lord Chancellor said, “If a question of law is referred to an arbitrator, he must decide upon it; and though he decides wrong, you cannot help it. In a case before Lord *Rosslyn*, Mr. *Mansfield* and I endeavoured to open an award on the ground of mistake of the arbitrator, the question referred being as to the vesting of a legacy; but it was held it would not do.”

(a) 6 Ves. jun. 282.

ALIVON v. FURNIVAL.

Where an action was brought in this country on a foreign judgment, and the plaintiff obtained a verdict and judgment, this Court refused to

HENDERSON having obtained a rule for charging the defendant in execution—

Follett moved to stay the charging in execution, or to discharge the defendant out of custody. From the affidavit prevent the plaintiff charging the defendant in execution upon the latter judgment, though it was sworn that an appeal was still pending in the foreign Court upon the original judgment, it not appearing that the appeal had been proceeded with.

vits it appeared that the judgment on which the action was brought, and in which the plaintiff ultimately obtained a verdict (a), was the judgment of a *French* Court, confirming a prior judgment or award between the parties, and that against the judgment on which the action was brought an appeal was lodged in the Court of in *France* before the action on the judgment was commenced in this Court, and that that appeal was still pending. At the trial in this Court, the defendant was prepared with witnesses to shew that no debt was due to the plaintiff, and that the original award was made without hearing the witnesses for the defendant. The award was not made in pursuance of any submission between the parties, but under an order of Court. As a writ would be sufficient to suspend execution, so it was contended that the appeal now pending in the *French* Court, against the very judgment on which the action was brought, furnished at least an equitable ground to stay execution on the judgment in this Court till the appeal against the original judgment was determined. The judgment may be still reversed. The present motion is only to suspend the enforcing an execution to which it may turn out the defendant is not at all liable. A case before the Vice-Chancellor was cited upon the trial to shew that no evidence could be given to disprove a foreign judgment.

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PARKE, B.—That was one of the objections urged before the Court when this case was argued. We considered it an award, but it became unnecessary to decide that point. Our decision on that occasion cannot be now impeached. All the points urged before the Court were attended to by them, and decided upon. I do not mean to throw any doubt upon the opinion of the Vice-Chancellor. I am of opinion that this motion is too early; it will be time enough to apply when the judgment of the *French* Court is reversed. The judgment of the Court is good till

(a) See 1 Cr., M., & R. 277.

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it is set aside. A writ of error does not suspend a judgment. The appeal was brought before the present action was commenced, and it does not appear to have been proceeded with; that is endeavoured to be accounted for by saying that the defendant, by being arrested in this country on the judgment, was prevented from proceeding with the appeal; but I think that makes no difference. The defendant should have gone on with the appeal; at present it is sufficient to say that there is no ground for the motion.

The other Barons concurred.

Rule refused.

WILLIAMS v. COOPER.

In an action for work and labour, the defendant, on a judgment by default, is at liberty to cross-examine the plaintiff's witnesses, who are called to prove the work done, as to whether the work was done on the defendant's detainer or not.

J. JERVIS shewed cause against this rule, which had been obtained by *R. V. Richards*, for setting aside an inquisition of damages for misdirection on the part of the under-sheriff. This action was brought by the plaintiff to recover the value of certain work and labour as a surveyor. The defendant suffered judgment by default. At the trial of the writ of inquiry the plaintiff produced witnesses to prove the work done. The defendant cross-examined the witnesses as to whether certain portions of the work had been done on the retainer of the defendant. The question was objected to by the plaintiff, on the ground that the only question was as to the value of the work done; and that, if he disputed his liability, he should not have suffered judgment by default. The under-sheriff refused to allow the question to be put.

PARKE, B.—The under-sheriff was mistaken; a judgment by default admits something to be due, but disputes the amount; the question, therefore, was properly put.

Rule absolute.

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MADDELEY v. BATTY.

SIR W. OWEN shewed cause against a rule which had been obtained by *Kelly* for judgment as in case of a nonsuit. The trial was directed to be before the Sheriff under the Writ of Trial Act. Issue was joined on *June* the 20th, and notice of trial was given for the 18th *July*. The plaintiff did not proceed, but countermanded the notice of trial. He contended that such a motion could not be made, and that, if it could, it was premature. The act (a) which authorized the trial contains no special provision authorizing such a motion, and the act (b) which gave the motion for judgment as in case of a nonsuit did not contemplate the present case.

ALDERSON, B.—The 14 *Geo. 2*, c. 17, gives a judgment as in case of a nonsuit, if the party does not bring on his issue to be tried according to the course and practice of the Court. The plaintiff has not proceeded according to the practice of the Sheriff's Court.

PARKE, B.—That act alludes to the practice of the Court which existed then or might exist thereafter. Notice of trial having been given, the motion is not too early.

Rule discharged, on a peremptory undertaking to try at the next practicable Sheriff's Court.

(a) 3 & 4 Will. 4, c. 42.

(b) 14 *Geo. 2*, c. 17.

Where a trial is ordered to take place in the Sheriff's Court under the Writ of Trial Act, and the plaintiff does not proceed to try according to the course and practice of the Sheriff's Court, the defendant may apply for judgment as in case of a nonsuit.

Where issue was joined on the 20th *June*, and notice given for trial at the Sheriff's Court on the 18th *July*, which the plaintiff countermanded: —*Held*, that a motion in the term next following for judgment as in the case of a nonsuit was not too early.

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BLACK v. SANGSTER.

A plaintiff a few days previously to the assizes obtained a Judge's order, giving him liberty to amend, and the defendant was to have two days' time to plead anew. The plaintiff afterwards delivered the issue, and took no further notice of the order, either by amending or rescinding it; and though the defendant returned the issue as irregular, the plaintiff proceeded to trial, and got a verdict. The Court refused to set aside the verdict as irregular.

BUCKLE moved for a new trial for irregularity under these circumstances:—On the 24th of *July* (a week only previous to the commission day for the last assizes at *Kingston*), the plaintiff obtained a Judge's order to amend his declaration. The order was in these terms:—"Upon hearing the attornies or agents on both sides, I do order, that, upon payment of the costs incidental to the amendment, the plaintiff shall be at liberty to strike out the 2nd count, and that the defendant shall have two days' time to plead anew after the amendment." The order was drawn up and served. The plaintiff, however, soon after delivered the issue without having made any amendment, but the defendant returned it, contending, that, as the order remained unrescinded, the plaintiff was bound to act upon it. Two days only before the commission day notice of trial was given. He contended that the plaintiff ought to have got the order rescinded; and by not doing so the defendant was taken by surprise, and had not prepared for trial. He cited *James v. Kirke (a)*, where *Abbott, C. J.*, says, "This is an application by the plaintiff to set aside part of an order obtained by himself. He was the person applying to the learned Judge for the order to amend the declaration on the terms imposed of giving defendant an imparlance until the next term, as the price of the indulgence. He need not have taken an order at all, but he thought fit to take it himself." So in *Wilson v. Hunt (b)*, it seemed to be admitted that a Judge's order when drawn up and served was binding upon the party who obtained it.

Lord LYNDEHURST, C. B.—In the latter case the order

(a) 1 Chit. Rep. 246.

(b) 1 Chit. Rep. 647.

was different; it was imperative. The order in the present case gives *liberty* to amend; the plaintiff, therefore, had an option. If the notice of trial was irregular, you might have applied to a Judge to set it aside and put off the trial; but, after a trial, and taking the chance of a verdict, you are too late.

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PARKE, B.—You were probably under terms to take short notice of trial. When the plaintiff gave notice of trial upon the whole record, it shewed that he did not mean to abandon the second count.

ALDERSON and GURNLEY, Barons, concurring—

Rule refused.

JOHNSON v. BUDGE.—THOMAS v. BUDGE.—NATHAM v. BUDGE.

THESE were actions of trespass for assaults. The defendant pleaded that he was the captain of a ship, and the plaintiffs were his seamen, and that they mutinied, and that the assaults were committed in the infliction of necessary chastisement. Upon this plea issues were joined, and the causes were set down to be tried on *Monday* the 17th of *November* before *Bolland*, B., but were adjourned to *Wednesday* the 19th, on which day the defendant died, but the actions were not tried.

Where three causes stood over by adjournment from one sitting day in term to another, and before they were tried the defendant died, the Court refused to name a special adjournment day in term for the trials of the causes to prevent the suits abating.

Platt, on the following day, moved that these trials might be specially adjourned to the last day of the term, being next *Tuesday* the 25th, to prevent injustice. He

Semble, that the sittings in term are not regarded as one sitting in law, so that a trial at any sitting

day would have relation to the first day of the sittings.

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contended that the sittings were but one day in law; and where the death happens after the first day of the sittings there would be a relation back to that day.

PARKE, B.—You would find a difficulty in making that out; you will not find it in any book of practice, because it is only recently that there has been an adjournment to a subsequent day in term. There would be a difficulty about it in any mode, because the *postea* must be dated of the very day of the trial.

GURNEY, B.—In term the very day of trial is taken notice of.

BOLLAND, B., referred to *Taylor v. Harris* (a).

Hoggins and *Wortley* opposed the application, and argued, that, even if the verdict related back, it could

(a) 3 Bos. & Pull. 549. In that case the defendant having died the night before the trial of a cause at the sittings in term, and a verdict having passed for the plaintiff, that verdict and the judgment entered up thereon were set aside on application to the Court. The case of *Jacobs v. Miniconi*, 7 T. R. 31, having been cited, where it was held, that the death of the defendant between the commission day and day of trial was not a ground for setting aside a verdict for the plaintiff, Lord Alvanley observed, that, with respect to that case, it was to be remembered, that the cause there might have been tried at any period after it had once been entered in the Judge's cause paper.

Nothing but the multiplicity of business prevented it from being tried on the first day of the sittings. But, said his Lordship, the sittings in term neither commence with the term, nor are any part of the term; they are appointed at the discretion of the Chief Justice; and, if a cause, from never having been entered in the cause paper, could not possibly have been tried until after the death of the defendant, a verdict obtained after his death cannot stand. Indeed, the *postea* is made up as of the very day on which the cause was tried; whereas, in the case of trials after the term, the *postea* is made up as of the first day of the sittings.

only be good by 17 *Car.* 2, c. 8, which did not embrace such actions as these which died with the person; and that it would be a hardship upon the representatives, who were now interested, if these plaintiffs were allowed to go to trial without the presence of any one to instruct the attorney for the defendant, and particularly as the judgment would take precedence of all other debts; and they cited *Bennett v. Holden* (a).

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The Court seemed at first inclined to direct a trial on *Monday*, and that the plaintiff should draw up the *postea*, as he might be advised; but ultimately refused the rule, *Parke, B.*, saying they could do nothing in the matter; that they could not allow the trials to take place on the last day of term, and that the convenience of the public could not be sacrificed to these plaintiffs.

Motion refused.

(a) 1 *Lev.* 277; 11 *Vent.* 236, S C.

Ex parte SIRATT.

THIS was a motion calling upon an executor to account on oath and pay the legacy duties. The Court being of opinion that he ought to account—

Amos contended, that, upon the 23rd sect. of the 53 *Geo.* 3, c. 108 (a), the rule ought to be made absolute with costs.

Where a motion is made against an executor to compel him to account, and the rule is made absolute, it is not imperative upon the Court to make the rule absolute with costs.

(a) By which it is enacted, "that, for better securing the duties in general under the management of the commissioners of stamps, be

it further enacted, that, in all actions, bills, complaints, informations, and proceedings, had, commenced, prosecuted, entered, or filed, or

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Crowder, contra, contended, that it was not imperative upon the Court to give costs; and that the circumstances of the case shewed the executor had a good excuse for not having accounted, as the affairs were not yet wound up, and there was no affidavit of any previous application having been made.

PARKE, B.—If that section applies to the present case, and this case be considered as coming within the meaning, still I think the act is not imperative, and that, under the circumstances, this rule should be absolute without costs.

Rule absolute, without costs.

hereafter to be had, commenced, prosecuted, entered, or filed, in the name of any person for and on the behalf of his Majesty, his heirs or successors, for the recovery of any duties, debts, or penalties granted or imposed, due or payable by or under any act or acts of Parliament now in force

relating to the duties under the management of the commissioners of stamps, or by or under this act, it shall be lawful for his Majesty, his heirs and successors, to have and recover such duties, debts, and penalties, with full costs of suit and all charges attending the same."

KENT v. JONES.

An affidavit of the service of a rule *nisi* at the chambers of an attorney, by leaving it with a laundress there, held insufficient, because it did not state that the deponent believed her to be the defendant's servant.

HEATON moved to make a rule absolute, on an affidavit of service of the rule *nisi* at the chambers of the defendant, who was an attorney, by leaving the same with a laundress at the chambers. The affidavit stated that the laundress admitted herself to be the defendant's servant; but it did not go on to state that the deponent believed her to be so.

Per Curiam.—That will not do, you must swear to your belief of her being the defendant's servant.

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Rule refused (a).

(a) The same objection was by *Kelly*, and the Court directed taken to an affidavit in a case of the affidavit to be amended.
Williams v. Passmore on a motion

COLLETT v. COLLETT.

THIS was an action of debt by the two plaintiffs as executrixes. The commencement of the declaration complained against the defendant of a plea that he render to the plaintiffs as executrixes the sum of 500*l.*, which he owed to and unjustly detained from them. The defendant demurred specially on account of the declaration being in the *debet* and *detinet*.

A demurrer to a declaration by executors, commencing in the *debet* and *detinet*, was overruled.

Shaw for the demurrer.

W. H. Watson, contra.

Per Curiam.—The allegation may be rejected.

Judgment for the plaintiffs.

ILES v. TURNER and Others.

THIS was an action of trespass.—The general issue was pleaded as to all the trespasses except as to one day, and,

Where two issues were raised by the pleadings, and the jury found upon

both, but the Judge, before whom the cause was tried, discharged the jury upon the second issue, upon misapprehension that the verdict upon one issue rendered the other issues immaterial, the Court held that the proper course was not to move for a new trial, but to apply to a Judge to have the verdict corrected according to his notes.

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as to the trespass committed on that day, they pleaded that they entered the plaintiff's house to put out a fire, and to prevent the plaintiff from burning his house down. The cause was tried at the assizes before *Littledale, J.*, and the jury were deliberating for a considerable time, and ultimately the verdict was received by the learned Judge at his lodgings. The jury found a verdict against two of the defendants, and that there was no pretence for saying there was a fire. The learned Judge thereupon discharged the jury as to the second issue, supposing that the general issue was pleaded to the whole declaration.

Platt now moved for a new trial.

PARKE, B.—Your application should be to the Judge who tried the cause to correct the verdict according to his notes.

LORD LYNTHURST, C. B.—That is the usual course.

Rule refused.

SCOTT v. COGGER.

An application to set aside an interlocutory judgment for irregularity, after notice of inquiry on the 4th November, was held to be too late on the 12th.

THE declaration in this cause having been improperly filed instead of being delivered, and a rule *nisi* having been obtained by *Mansel* for setting aside the judgment founded thereon, the only question was, whether the application was in time. Notice of inquiry was given on the 4th for the 12th, and on the latter day the motion was made.

Greaves shewed cause, and cited *Smith v. Clarke (a)*,

(a) Ante, Vol. 2, p. 218.

Firley v. Rallett (a), and *Cox v. Tullock* (b), to shew that the application was too late.

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GURNEY, B., held that the motion was too late, and discharged the rule.

Rule discharged.

(a) Ante, Vol. 2, p. 708.

(b) Id. 478.

HEANE v. BATTERSBY.

THIS was a motion to set aside a judgment on payment of costs on an affidavit of merits.

Channell shewed cause on very long affidavits, going into a history of the cause, and imputing great negligence on the part of the defendant, a bad plea having been once returned, and then a special plea was delivered without the signature of counsel, for which judgment was signed, and therefore he contended that the defendant was entitled to no indulgence.

Where a motion is made by a defendant to set aside proceedings on an affidavit of merits and payment of costs, the plaintiff is not entitled to go into a long statement in his affidavit to shew that the defendant has no merits, and, if he does, the Court will order the Master not to allow them.

Barstow shewed cause, and complained of the great length of the affidavits produced in answer to the defendant's positive affidavits of merits.

GURNEY, B. (a).—I wish the plaintiff's attorney had followed the good example of returning the pleas for the purpose of having them signed. The rule must be absolute on payment of costs; but the Master will not allow the costs of those parts of the affidavits which are intended as an answer to the defendant's affidavit of merits.

Rule absolute on those terms.

(*) Sitting alone.

1834.

Bail coming up a second time to justify must pay or deposit the costs of a former unsuccessful attempt; and where costs are payable, the defendant's being in prison will not excuse him from payment.

PASMORE'S Bail.

CHANDLESS objected to the justification of these bail, on the ground of the costs of a former unsuccessful attempt to justify not having been paid.

R. V. Richards, in support of the bail, contended that no costs were payable until three notices had been given, and that it had been so held in the *King's Bench*.

Chandless.—The practice of this Court differs from that in the *King's Bench* in this respect.

GURNEY, B.—The costs must be paid or deposited.

The costs having been deposited—

Chandless objected, that, since the bail came up on the former occasion, when one of them was rejected, a fresh bail had been put in in lieu of the rejected bail, without an order of the Court, as required by rule.

R. V. Richards.—The defendant, since the former occasion, rendered to prison, and the rule, therefore, does not apply.

A fatal objection was then pointed out in the affidavit of justification, and *Chandless* applied for the costs of the present opposition.

Richards, contra, contended that the rule as to costs did not apply to the case of a prisoner, and cited a case of *Davis v. Gray* decided by Mr. Baron *Bayley*.

GURNEY, B.—The defendant being a prisoner does not, I think, make any difference, and it is reasonable that the plaintiff should have costs.

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ABRAHAM v. COOK.

THIS was a case in the special paper. The paper books for the plaintiff were delivered, but those for the defendant had not been delivered. *Parke, B.*, ordered the case to be struck out.

If one side neglects to deliver his demurrer books to the Judge, the other side should do so for him, and then he will be entitled to judgment; but otherwise the case will be struck out.

R. V. Richards for the plaintiff.—The rule is, I believe, that, if one party neglect to deliver the paper books, the other party *may* do so for him; it is not compulsory upon him (a). The rule was directed against that party only who neglects to deliver his books. The plaintiff has delivered his and is ready to go on.

PARKE, B.—Where one party has delivered all the books, he is entitled to judgment; but where he has only delivered his own, and the other party has not delivered any, the case must be struck out. You should have delivered all the books, and the case must be set down again.

Cause struck out accordingly.

(a) See 7 Reg. Gen. H. T. 4 Will. 4, ante, Vol. 2, p. 305.

M'CORNISH v. MELTON.

TO a declaration in debt on a judgment the defendant pleaded, that, after the recovery of the judgment, to wit, on &c., the plaintiff issued a *ca. sa.* against the defendant directed to the sheriff of *Middlesex*, under which the defendant was arrested, and kept in prison for twenty days.

It is no answer to an action of debt on a judgment, that the defendant had been taken under a writ of *ca. sa.* issued on the judgment, and detained in

custody twenty days, if it appears that the defendant was by a Judge's order let out of custody on certain terms.

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The plaintiff replied, that the defendant obtained a Judge's order for discharging the defendant out of custody for irregularity, *he having been before taken in execution on the same judgment*, the defendant undertaking to bring no action. The defendant demurred.

Miller, in support of the demurrer.—The question is, whether a defendant having been twice taken in execution is not a satisfaction of the judgment?

LORD LYNTHURST, C. B.—We only know of one writ which was set aside for irregularity.

PARKE, B.—The Judge's order mentions another writ, but that is no evidence of the fact; we do not know that it is true. In fact there has been no taking in execution; the writ having been set aside, it is as if there was no writ; it was mere waste paper.

Miller.—It is a satisfaction of the debt, inasmuch as the plaintiff was a party to the terms on which the writ was set aside. The defendant was imprisoned for twenty days, for which he was entitled to some compensation; and the plaintiff entered into an arrangement by which the defendant was precluded from bringing an action, the plaintiff therefore has derived a benefit from that arrangement, which he otherwise would not have been entitled to.

Platt, contra, was stopped by the Court.

Per Curiam.—The judgment must be for the plaintiff.

Judgment for the plaintiff.

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BROWN v. GERARD, Bart., late Sheriff of *Lancashire*.

THIS was an action nominally against the sheriff himself, but really against one of his officers of the name of *Oglethorpe*, who had given an undertaking to the plaintiff in the following terms:—"In consideration of the plaintiff's agreeing to accept of 12*l.* for the debt in this cause, together with the costs of the action, in seven days from this date, I undertake that the plea pleaded in this action shall be withdrawn, and that the plaintiff shall have judgment. Dated this 8th day of *August*, 1834." Upon an affidavit that the defendant was indemnified by the officer, and that the plea had not been withdrawn—

The Court refused to interfere in a summary way to compel a sheriff's officer to fulfil an undertaking given to a plaintiff.

Wightman moved for an attachment against the officer for not performing his undertaking, or that the Court would order him or the defendant to withdraw the plea according to the undertaking; and he likened it to the case of an attorney's undertaking, where the Court would interfere summarily.

GURNEY, B. (a).—The sheriff is not to be bound by the undertaking of the officer. The Courts enforce attorney's undertakings, because they are officers of the Court. This motion cannot be granted.

Rule refused.

(a) Sitting alone.

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TATE v. BODFIELD.

Where the declaration was delivered on the 7th to plead in four days, and on the 10th an order for particulars was obtained, which were delivered on the 13th:—*Held*, that judgment for want of a plea, signed at ten o'clock on the 15th, was regular.

The afternoon in the *Eschequer*, for the purpose of signing judgment, does not commence in term till three o'clock.

An affidavit of merits, that the defendant has a good and sufficient defence on the merits, without words applying it to the particular action, is insufficient.

A *RULE nisi* in this case was obtained by *C. Jones* for setting aside the interlocutory judgment (which had been signed for want of a plea) for irregularity, on the ground that it was signed too early.

J. Jervis shewed cause.—It appeared from the affidavits in answer, that the writ was served on the 27th of *October*, and, the defendant having appeared in person, the plaintiff delivered a declaration in chief on the 7th to plead in four days. On the 8th a summons for particulars was taken out, returnable on *Monday* the 10th, when an order for particulars was obtained. On the 13th particulars were delivered at four o'clock in the afternoon. On the 14th a summons for further time to plead was taken out, which was returnable on the following day at three o'clock. At one o'clock on that day the plaintiff signed judgment. The plaintiff did not attend that summons at three o'clock, and another summons for time was taken out, returnable on the following day, which was attended by both parties, and the defendant was then informed that judgment had been signed on the previous day. The objections were, that the judgment being signed whilst the summons for time was pending was irregular; and also that it ought not to have been signed till the afternoon, and that one o'clock was too early. It was now contended, that the summons for further time not being returnable till after the time for pleading had expired was no stay of proceedings; and no further time having been obtained before the plaintiff signed judgment there was nothing to prevent his doing so. Upon the other point it was contended that the rule respecting the afternoon signing did not apply to this Court.

Lord LYNDHURST, C. B.—The Master informs us that the office shuts at two o'clock, and opens again from three to six o'clock; one o'clock, therefore, was not in the afternoon.

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J. Jervis then contended that judgment might have been signed earlier, and that there was no rule which required the plaintiff to wait till the opening of the office in the afternoon.

C. Jones, in support of the rule, referred to the rule of *Hilary Term, 2 Will. 4, s. 48*, which gives the defendant the same time for pleading after the delivery of particulars as he had at the return of the summons; and also directs, that judgment shall not in any case be signed till the afternoon of the day after the delivery of particulars. The particulars here were delivered on the 13th; and therefore, under any circumstances, the plaintiff could not have signed judgment till the afternoon of the 14th: but, at the return of the summons for particulars, the plaintiff had one day left to plead; that would carry it on till the afternoon of the 15th, even supposing that the summons taken out on the 14th for further time was no stay of proceedings.

The Court (consisting of Lord LYNDHURST, and PARKE, ALDERSON, and GURNEY, Barons) held the judgment regular.

C. Jones then relied on an affidavit of merits, which would entitle him to set aside the judgment on payment of costs. The affidavit was in this form, "and this deponent is informed, and believes, that he has a good and sufficient defence on the merits," not saying "to that action."

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The Court held the affidavit defective in not being sufficiently precise, and discharged the rule.

Rule discharged, with costs.

BARRETT and Another v. WILSON.

An arbitrator, to whom all matters in difference are referred, has no right to state facts for the opinion of the Court, unless there is a special direction given to him to do so; in such a case, the opinion formed by the arbitrator is absolutely final.

THIS was a rule calling upon the plaintiffs to shew cause why the verdict which had been entered for them, under an award made in pursuance of an order of *Nisi Prius* should not be set aside, and a verdict entered for the defendant. The action was brought by the plaintiffs for disturbing them in the use of some water, and came on to be tried at the last *Yorkshire Assizes*, and was referred.

Wortley shewed cause, and contended there was no case made out for the interference of the Court.

LORD LYNTHURST, C. B.—If there is evidence to support the finding of the arbitrator we cannot disturb it, though we might have come to a contrary conclusion.

ALDERSON, B.—The only question is, whether there was sufficient evidence to have gone to a jury.

Wortley cited *Mason v. Hill and Others* (a), and *Dibben v. The Marquis of Anglesea* (b).

The Court then called upon *Alexander* to support his rule.

(a) 5 B. & Adol. 1.

(b) 10 Bing. 568.

Alexander.—The evidence does not warrant the finding for the plaintiffs. The arbitrator has found all the facts which are stated on the face of the award expressly to enable the Court to see whether he has drawn the right conclusion.

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ALDERSON, B.—That he cannot do. His opinion is final on the facts.

LYNDHURST, C. B.—We have no right to draw a conclusion from the facts. I should have hesitated to have come to such a conclusion, but it is his peculiar province. Suppose a jury to have found a verdict, the only question would have been, whether there was evidence to warrant that verdict; and I cannot say that in the present case there is not.

PARKE, B.—The finding of an arbitrator is more conclusive than that of a jury; his is absolutely final.

Alexander.—The Court can see whether the conclusion he has come to is right or wrong; he has come to that conclusion on a question of law, but has mistaken the law. The award is not final in not awarding as to the future use of the water.

PARKE, B.—That objection would only affect that part of the award; but we are neither judges of the fact, nor of the law.

ALDERSON, B.—The arbitrator might have had a power reserved to him to state a special case; that is frequently done.

LORD LYNDHURST, C. B.—The rule must be discharged.

Rule discharged, without costs.

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The Court declined to act upon an affidavit which was intituled *A. v. B., executor &c.*, without specifying the party of whom the defendant was executor.

CLARK v. MARTIN.

THIS was a rule which had been obtained by *Crowder* for judgment as in case of a nonsuit.

Austin shewed cause.—He objected to the affidavit on which the motion was made. The defendant was sued as executor, and the affidavit was intituled *William Newton Clark v. George Martin, executor &c.* He contended that it ought to have shewn of whom the defendant was executor, and that it would be impossible to assign perjury upon such an affidavit. There might be another action in which the defendant was executor of some other person. He cited *Richards v. Isaac (a)*, where an affidavit in support of a rule for judgment as in case of a nonsuit, intituled *Isaac, at the suit of Richards*, instead of *Richards v. Isaac*, was held insufficient. He also referred to *Tidd's Practice (b)*, where it is said, that, where a cause is depending in either Court, the affidavits should regularly be intituled with the Christian and surnames of all the parties, and the character in which they sue or are sued, which must also be inserted in the title of the affidavits produced to shew cause against any rule. And an ambiguity in the title, such as styling the plaintiff “ assignee,” without saying of whom, or giving any further explanation, is fatal (c). He also mentioned another decision in the *King's Bench Practice Court*, where *Littledale, Justice*, held a similar objection to be fatal.

A peremptory undertaking had been offered, but declined, because the affidavit in answer did not shew a sufficient cause for not proceeding to trial.

(a) Ante, Vol. 2, p. 710.
(b) Page 492.

(c) Citing 3 Taunt. 377; 1 Chit. R. 728, in notis.

PARKE, B., observed, that "assignee" was more vague than "executor," because a party might be assignee in various ways; and that the Master informed him that an affidavit intituled like the present was very common; he, however, advised the defendant to accept the offer of a peremptory undertaking, which was accordingly done.

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LANE v. THOMAS DRINKWATER.

THIS was an action of debt upon two annuity deeds; and was tried before *Alderson, B.*, in *London*, at the Sittings after last term, when the plaintiff obtained a verdict for 31*l.* 5*s.*, the arrears of the annuities. The first count of the declaration stated, "that on the 31st day of *October*, A. D. 1828, by a certain indenture between the defendant and *Robert Drinkwater* of the one part, and the plaintiff and *Allen Billing* of the other part, (with a *profert in curia*), the defendant and *Robert Drinkwater*, for the consideration therein mentioned, did for themselves severally and respectively, and for their several and respective heirs, executors, and administrators, grant, covenant, and agree, to and with the said plaintiff and *Allen Billing*, their executors, administrators, and assigns, that they the said defendant and *Robert Drinkwater*, their heirs, executors, administrators, and assigns, or some or one of them, should and would from time to time, and at all times during the term of 99 years thenceforth next ensuing, if the said plaintiff, and *Edward Lane* his son, and the said *Allen Billing*, and *James Edward Billing* his nephew, or the survivors or longest liver of them, should so long live, at or in the *Guildhall* of the City of *London*, well and truly pay unto the said *Thomas Lane* and his executors &c. one annuity or clear yearly sum of 30*l.* in the shares and proportions following, that is to say, 15*l.*, being one moiety of

In an action of debt on an annuity deed, it appeared that the covenant was with the plaintiff and another to pay to them one annuity of 30*l.*, a moiety of which was to be paid to the plaintiff, and the other to the other covenantee; by another part of the deed it appeared, that the annuity was to be secured by a joint judgment, &c. The plaintiff having obtained a verdict for arrears of the annuity due to himself, the Court arrested the judgment, on the ground that the other covenantee ought to have joined in the action.

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the said annuity or yearly sum, unto the said plaintiff, his executors, administrators, or assigns, and the sum of 15*l.*, the remaining moiety thereof, unto the said *Allen Billing*, his executors, administrators, or assigns, and the said moieties to be respectively paid by equal quarterly payments, on the 30th *January*, the 30th *April*, the 30th *July*, and the 30th *October*, in every year, clear of any deduction for taxes, rates, assessments, or any other matter whatsoever, the first payment of the said annuity or yearly sum to become due and be made on the 30th *January* then next ensuing, provided the said term should be then continuing, and in case the said term should determine by the death of the said plaintiff and *Edward Lane*, *Allen Billing*, and *James Edward Billing*, or the survivor or longest liver of them, between or in the interval of any two of the said quarterly days of payment, or before the said 30th day of *January* then next, then, that, in either of such cases happening, the said defendant, party hereto, and the said *R. D.*, their heirs, executors, administrators, and assigns, should and would in the like manner, in the moieties aforesaid, on demand thereof, well and truly pay or cause to be paid unto the said plaintiff, and the said *A. B.*, their executors, administrators, and assigns, such part of the said annuity or yearly sum of 30*l.* as should be in proportion to the number of days which should have elapsed prior to the day of the decease of the survivor or longest liver of them the said plaintiff and said *E. L.*, *A. B.*, and *J. E. B.*, and after the day of payment next or immediately preceding that event, if such event should happen after the said 30th day of *January* then next ensuing; as by said indenture, reference being thereto had, will amongst other things more fully and at large appear: nevertheless the said plaintiff in fact saith, that after the making of the said indenture, to wit, on the 27th *February*, A. D. 1833, at *London* aforesaid, a large sum of money, to wit, the sum of 50*l.*, of lawful money of *Great Britain*, of the said annuity,

for the said plaintiff's share, proportion, and moiety thereof, for a certain time, to wit, four years and two quarters of another year next before and ensuing on the day and year last aforesaid, and then last elapsed, became and was due and owing from the said defendant to the said plaintiff, and still is in arrear and unpaid, contrary to the form and effect of the said indenture, and of the said covenant of the said defendant in that behalf made as aforesaid, to wit, at *London* aforesaid, whereby an action hath accrued to the said plaintiff to demand and have of and from the said defendant the said sum of 50*l.*, being parcel of the said sum above demanded."

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The second count was in the same form as the first, for four years' arrears of an annuity of 10*l.*, granted by a subsequent deed in the same terms by which the first annuity was granted.

The first plea to the first count craved oyer of the deed therein mentioned, which was set out at length, and, amongst other things, recited, that *Thomas* and *Robert Drinkwater* had contracted and agreed with the plaintiff and *Allen Billing* for the sale to them of an annuity or yearly sum of 30*l.*, for ninety-nine years determinable as therein mentioned, and repurchaseable according to the proviso therein contained. The covenant was in these terms (a):—"Thesaid *T. D.* and *R. D.* do hereby for themselves severally and respectively, and for their several and respective heirs, executors, and administrators, grant, covenant, and agree to and with the said *T. L.* and *A. B.*, their heirs, executors, administrators, and assigns, that they the said *T. D.* party hereto, and *R. D.*, their heirs, executors, or administrators, or some or one of them, shall and will from time to time, and at all times during the said term of ninety-nine years henceforth ensuing, if the said *T. L.*, and *E. L.* his son, and

(a) Only as much of the deed is stated as is necessary to elucidate the question discussed.

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the said *A. B.*, and *J. E. B.* his nephew, or the survivors or longest liver of them, shall so long live, at or in the *Guild-hall* of the City of *London*, well and truly pay unto the said *T. L.* and *A. B.*, their executors, administrators, and assigns, an annuity or clear yearly sum of *30l.*, of lawful money current in *Great Britain*, in the shares and proportions following, that is to say, the sum of *15l.*, being one moiety of the said annuity or yearly sum, unto the said *T. L.*, his executors, administrators, or assigns, and the sum of *15l.*, the remaining moiety thereof, unto the said *A. B.*, his executors, administrators, or assigns, the said moieties to be respectively paid by equal quarterly payments, on the 30th day of *January*, the 30th day of *April*, the 30th day of *July*, and the 30th day of *October*, in every year." The deed also contained a grant of the interest of the *Drinkwaters* in a piece of land and in certain stock "to the use of the plaintiff and *Billing*, their heirs and assigns, for ever," upon trust for better securing the said annuity; "and for that purpose, and in case, and when, and so often as the said annuity or yearly sum, or any part thereof, shall be in arrear and unpaid in the whole, or in part, by the space of twenty-eight days next after any one of the days or times hereinbefore appointed for payment thereof, then and in that case, and from time to time as often as the same shall happen, they the said *T. L.* and *A. B.*, their heirs, executors, administrators, or assigns respectively, do and shall, by and out of the rents and profits, interests, dividends, and annual income of the said close of meadow ground, Bank annuities, residuary estate, and premises respectively, hereby granted, released, and assigned, or any part thereof, or by sale thereof, or any part thereof, or, by bringing actions against or making distresses upon the tenants or occupiers of the said ground and premises, recovering the rents then in arrear, or by entries upon the said ground and premises, or by any ways or means whatsoever, as to them the said *T. L.* and *A. B.*, their heirs, executors, administrators, or assigns respectively shall

seem meet, levy and raise all such arrears of the said annuity or yearly sum of 30*l.* hereby granted, as from time to time shall become due and remain unpaid, together with all such costs, damages, and expenses as the said *T. L.* and *A. B.*, their executors, administrators, or assigns, shall incur, expend, or be put to, by reason of the non-payment of the said annuity, or yearly sum, or any part thereof, and together also with the costs and expenses of and attending the execution of the trusts hereby declared; and upon this further trust, that they the said *T. L.* and *A. B.*, their heirs, executors, administrators, and assigns respectively, do and shall, by and out of the monies to be received as aforesaid, in the first place deduct, detain, and reimburse, to and for themselves and himself, the costs and expenses of and attending the execution of the trusts hereby reposed in them; and in the next place retain and supply unto and for themselves, the said *T. L.* and *A. B.*, their executors, administrators, and assigns, in the shares and proportions aforesaid, all arrears of the said annuity, and all costs, damages, and expenses which they or either of them shall have incurred, suffered, or sustained, by reason or on account of the nonpayment of the said annuity, or yearly sum, or any part thereof, or in or about recovering or enforcing the payment thereof."

The proviso for redemption was in these terms:—"Provided always, and be it hereby declared and agreed, by and between the said parties hereto, that in case the said *T. D.* party hereto, and *R. D.*, their heirs, executors, or administrators, or either of them, shall at any time hereafter be desirous of redeeming or repurchasing the said annuity or yearly sum of 30*l.*, and of such their or his intention shall give unto the said *T. L.* and *A. B.*, their executors, administrators, or assigns, seven days' notice in writing, then that the said *T. L.* and *A. B.*, their executors or administrators, shall and will, at the expiration of the notice, on receiving all arrears of the said annuity, and all

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costs and charges paid or incurred by them in the premises, accept, receive, and take the sum of 307*l.* 10*s.* as and in full for the repurchase or redemption of the said annuity; and on receipt thereof, and all arrears of the said annuity as aforesaid, deliver up these presents to be cancelled, and, at the costs and charges of the said *T. D.* party hereto, and *R. D.*, their heirs, executors, or administrators, acknowledge or cause satisfaction to be acknowledged on the record of the judgment which shall be entered up upon the warrant of attorney, and release and re-assign the said close of meadow ground, stock, parts and shares of Bank annuities, residuary estate, and premises, or such part thereof as shall not have been disposed of under the trusts aforesaid, unto the person and persons so redeeming or repurchasing the said annuity, as he or they shall direct, and in such case the said annuities to be granted and remedies for enforcing the same shall cease, determine, and be void, anything herein contained to the contrary notwithstanding."

The plea then alleged that the defendant and *R. Drinkwater* had well and truly paid the annuity on the days it became due, according to the indenture.

The second plea alleged, that, on the 30th day of *October*, A. D. 1830, the said defendant and the said *R. D.* became and were desirous of redeeming and repurchasing the said annuity or yearly sum in the said first count mentioned, and did for that purpose, by and with the consent of the said plaintiff and the said *A. B.*, who then and there dispensed with the seven days' notice in writing for that purpose required by and specified in the said indenture in the said first count mentioned, pay to the said plaintiff and the said *A. B.*, for the repurchase and redemption of the said annuity, the said sum of 307*l.* 10*s.* in the said indenture mentioned, as in full for the repurchase and redemption of the said annuity in the said first count mentioned, and the said plaintiff and the said *A. B.* did then and there accept, receive, and take the said sum of 307*l.* 10*s.* as in

full for the repurchase and redemption of the same. And the said defendant and the said *R. D.* did then and there pay to the said plaintiff and the said *A. B.* all arrears of the annuity then due and payable, and all costs and charges theretofore paid and incurred by the plaintiff and the said *A. B.* in respect of the annuity, and then and there repurchased and redeemed the same annuity according to the proviso in that behalf contained in the said last-mentioned indenture. And this the said defendant is also ready to verify, wherefore he prays judgment if the said plaintiff ought to have or maintains his aforesaid action thereof against him the said defendant, &c.

There were two similar pleas to the second count. The third plea to both counts was, that no part of either annuities was in arrear; and lastly, a set-off was pleaded.

The replications took issue on all the pleas. The replication to the second plea was in this form: That the plaintiff ought not to be barred of his action, because, protesting that the said seven days' notice in writing was not dispensed with as in the last-mentioned plea mentioned, for replication in this behalf the plaintiff saith, that the said plaintiff and the said *A. B.* did not accept, take, or receive the said sum of 307*l.* 10*s.* in the second plea mentioned as and in full for the repurchase and redemption of the said annuity in the said first count mentioned, nor did the said defendant and the said *R. D.*, or either of them, pay to the said plaintiff and the said *A. B.*, or either of them, the arrears of the said last-mentioned annuity, nor did the said defendant nor the said *R. D.* repurchase or redeem the same annuity according to the indenture in the first count mentioned, in manner and form as the said defendant hath above in his said second plea in that behalf alleged. And this the said plaintiff prays may be inquired of by the country, &c.

A rule *nisi* having been obtained for arresting the judgment, on the ground that *Lane* and *Billing* ought to have

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joined in the action, and also why a replader should not be awarded on the ground, that, by the replication to the second plea, an immaterial issue was raised—

Kelly and *Ball* shewed cause upon the first point.—They contended that it was necessary to look to the whole of the deed, and that the proper construction of it was to give to each of the covenantees an annuity of 15*l.*, and that therefore the action was properly brought by the plaintiff alone; and that it might have been doubtful, if the action had been brought by *Lane* and *Billing* jointly, whether it could have been maintained. The annuities are payable by the covenant to the covenantees *respectively*; the interest, therefore, in the two parts of the annuity is several. They cited in support of their view of the case *Eccleston v. Clipsham* (a), where it was held, that though a covenant be joint and several in the terms of it, yet, if the interest and cause of action be joint, the action must be brought by all the covenantees: and on the other hand, if the interest and cause of action be several, the action may be brought by only one. In *James v. Emery* (b), *Gibbs*, C. J., says the principle on which this case must be determined is perfectly well known and established. Wherever the interest of parties is separate, the action may be several notwithstanding the terms of the covenant on which it is founded may be joint; and, where the interest is joint, the action must be joint, although the covenant in language purport to be joint and several. *Withers v. Bircham* (c), *Owston v. Ogle* (d), *Servante v. James* (e), were cited to the same point.

PARKE, B.—Your argument is, that two distinct annuities were granted of 15*l.* each; the deed, therefore, ought to

(a) 1 Saund. 153.

(c) 3 B. & C. 254.

(b) 5 Price, 533; 8 Taunt. 245,
S. C.

(d) 13 East, 538.

(e) 10 B. & C. 410.

have been stamped with two annuity deed stamps instead of one; but that objection is not now open to the defendant, because it was not taken at the trial.

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Kelly and Ball.—With respect to the other point, it is contended on the other side, that the issue on the acceptance of the money is immaterial; but whether the non-acceptance is material or not it is unnecessary to argue; for the plea consists of several allegations, which the terms of the proviso for repurchase rendered necessary to be inserted; if any one of those is disproved, the annuity is not repurchased. The replication is not simply upon the fact of the acceptance, but it puts in issue all the averments in the plea: one is, that the annuity was not repurchased; and the other is, that the arrears were not paid. The replication may be double, but it is too late to take that objection.

PARKE, B.—It is doubtful upon the face of the plea whether it was intended to be pleaded as a payment according to the terms of the deed, or as accord and satisfaction; if the latter, it could not be contended that the acceptance was immaterial.

Merewether, Serjt., and Rogers, contra.—The plea was founded on the proviso, which casts upon the plaintiff the obligation of receiving the money. There is no act to be done by the plaintiff as receiver; his acceptance is wholly immaterial. If the plea should appear to be so constructed as that it must be looked upon as a plea of accord and satisfaction, there would be more difficulty; in a plea of accord and satisfaction, the defendant discharges himself from a liability by shewing an agreement with the plaintiff, and the acceptance in satisfaction is the gist and essence of the plea; but assuming the plea to be properly framed with reference to the deed, the issue is

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immaterial. The payment of the arrears was not in question; the only question is, whether the principal was paid. The introduction of an immaterial averment in a plea will not warrant the taking issue upon it, or make an issue taken upon it material; the material point of the plea, which is the payment, remains unanswered, and the plaintiff cannot have judgment on the record.

As to the other point. The general rule cannot be disputed; the question is, how it applies to the present case. Here the consideration is joint, one sum of 300*l.* is given by the plaintiff and *Billing* jointly for one annuity of 30*l.*, and the covenant is with them and their heirs, and has not the words "several" or "respective." The annuity was to be paid in two parts, but that was only a regulation in the mode of paying the money. *Anderson v. Martindale* (a) is in point.

PARKE, B.—That was a covenant with two to pay to one: the other, therefore, had no interest. If one only had sued, you would have struck out a name from the deed; that you cannot do. This case cannot be likened to that. The question is, whether the interest is not several though the words are apparently joint. The object appears to have been to save a stamp. Do you contend that if one executed a release that would make an end of the annuity?

Merewether, Serjt.—That is our argument. The interest in the annuity is not severed merely by the mode of payment pointed out. The covenant on the part of the defendants contains the words "jointly and severally;" but in covenanting with the plaintiff and *Billing* to pay, these words are omitted: the absence, therefore, of these words when the covenantees are mentioned, and their in-

(a) 1 East, 497.

troduction when the covenantors are mentioned, shew that the covenant was so drawn designedly, and the construction contended for on the other side, will subject the defendant to two actions instead of one, without any words to warrant it.

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Cur. adv. vult.

The judgment of the Court was afterwards delivered by

PARKE, B.—This was an action upon certain covenants contained in two indentures, the terms of which are the same. (His Lordship then stated the pleadings with respect to one deed as they appear above). The cause went to trial and a verdict was found on all the issues for the plaintiff. There was a motion for a new trial, and also for judgment *non obstante veredicto*. Three objections were taken:—*First*, that the replication admitted the payment of the money for the redemption of the annuity and also the arrears, and that, therefore, the annuity was at an end; *secondly*, that the issue raised on the second plea was an immaterial issue, which would have been a ground for a repleader; and, *thirdly*, that the action was improperly brought by one only of the covenantees. The last objection is we think fatal, and therefore it is unnecessary to give any opinion upon the other two, though we think we should have no difficulty in overruling them. The rule laid down in *Eccleston v. Clipsham* is this; that though a covenant be joint and several in the terms of it, yet, if the interest and cause of action be joint, the action must be brought by all the covenantees; but if the interest and cause of action is several, the action may be brought by one only. The question therefore is, whether this is a joint covenant, so that the action could not be brought by one only. The deed grants one annuity of 30*l.*, of which half is to be received by each; it is not a grant of two several annuities of 15*l.*; it is to be secured by a joint judgment and by a grant of

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a reversionary interest in certain property, and the deed gives a joint power of attorney to receive the interest on certain stock, and a joint power of attorney to sell the stock. We therefore think that only one annuity was granted, and that the action should have been brought by both the covenantees. If the deed contained two distinct grants of two annuities, we do not mean to say that their being jointly secured would make a difference; but here there is a joint grant according to the words of the deed, which must be taken in their usual and ordinary acceptation. The judgment for the plaintiff must, therefore, be arrested.

Judgment arrested.

D. G. WAIT, Clerk, *v.* BISHOP and Others (Assignees of the Estate and Effects of the Rev. D. G. WAIT, an Insolvent Debtor,) and JOHN NOKES, Defendant.

A levari facias, though lodged with the bishop, does not begin to operate till the writ of sequestration upon it is published.

Arrears of by-gone compositions for tithes do not pass under a sequestration, neither do they pass to the assignees of the rector under the Insolvent Debtors' Act.

THIS was a motion under the Interpleader Act, and came before the Court for argument in the shape of a special case, which had been agreed to be stated for the opinion of this Court, and was as follows:—"The above-named plaintiff, previously to the year 1829, was and still is rector of the parish of *Blayden*, in the county of *Somerset* and diocese of *Bath and Wells*, and a sequestration upon the said rectory having been granted by the bishop of *Bath and Wells*, in *July* of that year, to one *John Britten* for the arrears of an annuity secured to the said *J. B.* by a warrant of attorney and a demise of the living, and a rule *nisi* having been obtained in the Court of *King's Bench* for setting aside that sequestration, and the judgment on which it was founded, it was by a rule of that Court, made on the 14th of *June*, 1832, ordered, that no further proceedings should be taken in that sequestration, and that the said *J. B.* should account before

the Master for what he had received under the sequestration, he being allowed to retain the arrears that had become due on the annuity; and that until the account should have been so taken by the Master, no further proceedings should be had against the said *D. G. Wait* on the said warrant of attorney and judgment thereon, the said *J. B.* being at liberty thereafter to issue a fresh writ of sequestration for any arrears of the said annuity which might become due." The Master under this rule, on the 14th of *May*, 1833, made his *allocatur*, by which he stated, as the result of the account which had been produced according to the said rule, that the receipts under the said sequestration were 909*l.* 19*s.* 5½*d.*, and the payment 873*l.* 7*s.* 2*d.*, leaving a balance of 36*l.* 12*s.* 3½*d.* in the sequestrator's hands, applicable to the arrears of the said annuity due to the said *J. B.* The said *J. B.* having refused to remove his sequestration, on the 13th of *November*, 1833, a rule *nisi*: was obtained, calling upon the said *J. B.* to shew cause why the sequestration of the said *J. B.* should not be removed from the benefice of the said *D. G. Wait*, the said *J. B.* retaining all monies lawfully levied thereunder, and with liberty to the above-named assignees to issue sequestrations upon the said living; which rule, on the 22nd day of *November*, 1833, was made absolute in the terms of the rule *nisi*: but, on drawing up the rule absolute, the words "with liberty to the above-named assignees to issue sequestration upon the said living" were inserted contrary to the intention of the counsel for the several parties to the same rule, between whom there was an express understanding that so much of the rule *nisi* was abandoned; and accordingly, on the 8th of *January*, 1834, the said sequestration of the said *J. B.* was removed from the said benefice; but in the meantime, that is to say, the 26th of *April*, 1832, a writ of *levari facias de bonis ecclesiasticis*, issued upon a judgment duly obtained on a warrant of attorney given by the said *D. G.*

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Wait to the said *John Nokes* to secure to him the sum of 45*l.* 14*s.* 7*d.*, and returnable on a subsequent day, was lodged in the said registrar's office against the said *D. G. Wait*, at the suit of the above-named *J. N.*, for the said sum of 45*l.* 14*s.* 7*d.*, with directions from the said *J. N.* to Mr. *Parfit*, the registrar of the said bishop, to issue and publish a sequestration thereon; and on the 18th of *June*, 1832, a similar writ, issued upon a judgment duly obtained on a warrant of attorney given by the said *D. G. Wait* to the said *J. N.* to secure to him the further sum of 103*l.* 5*s.*, and returnable on a subsequent day, was lodged in the said registrar's office against the said *D. G. W.*, at the suit of the said *J. N.*, for the said sum of 103*l.* 5*s.*, with a direction from the said *J. N.* to the said registrar to issue and publish a sequestration thereon, which said judgments were respectively signed within twenty-one days from the execution of the said warrant of attorney on which they were respectively signed; and which said two sums of 45*l.* 14*s.* 7*d.* and 103*l.* 5*s.* were the amounts of certain costs in respect of business and disbursements made by the said *J. N.* for the said *D. G. W.* on the 10th of *October*, 1832; the said plaintiff, then being a prisoner within the operation of the Insolvent Debtors' Act, filed his petition to the Court for the Relief of Insolvent Debtors to be discharged, and on the 20th of *October*, 1832, duly filed his schedule according to the provision of that statute, and on the 23rd of *February*, 1833, he executed a regular assignment of his estate and effects to the above-named *W. B.*, *J. L.*, and *C. B.*, his assignees duly appointed, and was on the same day duly discharged. On the 14th *May*, 1833, the said assignees filed the order of adjudication of the said Court for Relief of Insolvent Debtors in the registrar's office of the said bishop, who on the 12th of *January*, 1834, granted to them a sequestration upon the said living, but expressly subject to the said writs of *levari facias* of the said *J. N.*, it being stated in the said

writs of sequestration that the same was so granted subject to the said writs of the said *J. N.* The said sequestration was duly published on the 12th of *January*, 1834. Previously to *Hilary* Term, 1834, the said *D. G. W.* brought several actions in this Court against persons occupying lands in the said parish of *Blayden* for arrears of compositions for tithes, particularly an action against one *John Bailey*, the elder, for an alleged arrear of 5*l.* composition for tithes, due 29th of *September*, 1833, in which action, upon an application made under the Interpleader Act, an order was made by the Honourable Mr. Baron *Bailey*, on the 4th of *December*, 1833, that, upon the said *J. B.* bringing into Court 5*l.* within a week, all further proceedings should be stayed until the 4th day of *Hilary* Term then next, which was accordingly done; and on the 28th of *January*, 1834, in *Hilary* Term, it was, by a rule then made in the said action, ordered by this Court that all further proceedings against the said *J. B.* the elder, in the said action, should be stayed until the further order of the Court, and that the sum paid into the Court by the said *J. B.* should remain in Court until the further order of this Court; and that a special case should be argued before the Court, wherein the said *D. G. W.* should be plaintiff, and the said assignees and the said *J. N.* should be defendants, and that they should be heard by counsel on the argument, and that the rights of the insolvent, and the said assignees, and the said *J. N.*, should be raised on the said cases; and that all questions of priority between the said assignees and the said *J. N.*, and the question of the costs of the several parties to the rule, should be reserved. The case then stated that two other actions were brought against other persons by Dr. *Wait* for tithes, also due 29th *September*, 1833, in which the amount was brought into Court, and proceedings stayed on the same terms, and with similar directions and stipulations in every

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respect as are contained in the order made in the action against *John Bailey*. On the 18th of *December*, 1833, there was and still is due to the Rev. *Daniel Wheeler*, licensed curate of the said parish of *Blayden*, 225*l.* 4*s.* for one year and a half's stipend in respect of the said cure.

The several sums so brought into Court being compositions for tithes of the rectory of *Blayden* aforesaid, which accrued between the 25th *March*, 1832, and 29th *September*, 1833, were the subject of dispute in the present case, and were claimed by three different parties:—

1st, Doctor *Wait*, the rector, (a discharged insolvent debtor), claimed them under the operation of 7 *Geo.* 4, c. 57, ss. 28, 34.

2nd, The assignees of Dr. *Wait*, who claimed them in their official character, and under the sequestration granted them by the bishop 12th *January*, 1834.

3rd, *Nokes*, (the other defendant), who claimed them on the ground of his *levari facias*, lodged prior to the sequestration of the assignees, which was granted to them, and subject to those writs.

The question for the opinion of the Court was, which of the above parties was entitled to the said sums so paid into Court (a).

The *Attorney-General* for Dr. *Wait*.—The arrears claimed by Dr. *Wait* became due at *Michaelmas*, 1833, and it is quite clear that the occupiers could have no defence to the actions brought to recover those arrears. Those actions were commenced before *Hilary Term*, 1834, before either the title of the assignees or that of *Nokes* commenced. *Britten* is not before the Court. He referred to the late case of *Shuter v. Hatch*, and *Bishop v. Hatch* (b).

(a) See Burn, E. L., tit. Sequestration.

(b) 3 Man. & Nev. 498.

The Court then called upon *Harrison*, who appeared for the assignees.—*Britten* was not in fact out of the benefice whilst these arrears were accruing; for, however his rights might be affected by the rule made by the Court of *King's Bench*, he was sequestrator *de facto* until his sequestration was actually removed in *January 1834*, when the sequestration of the assignees was published; consequently, there was no period of time during which there was not some sequestration on the living; then, as the right to the tithes and the arrears of compositions for tithes is in the sequestrator for the time being, and not in the rector, and as in the present case the assignees are the existing sequestrators, they have the right, and not the incumbent; and, it is submitted, that the sequestrator is not only entitled to all accruing tithes but also to arrears of tithes. Even supposing that they belonged at one time to the incumbent *Dr. Wait*, he never got them or claimed them. He ought to have reduced them into possession; and not having done so, they belong to the assignees. An arrear is now due to the curate of 225*l.*, which must be paid by the sequestrator in the first instance, as he is bound to pay all primary charges upon the benefice; and as this will fall upon the assignees in their character of sequestrators, it affords a sufficient reason why the arrears of tithes ought to go to them, to afford them the means of doing so. The assignees are therefore entitled to them under the sequestration. Again, if they are not arrears of tithes covered by the sequestration, then they are only debts from the tithe payers to some one—a mere *chose in action* and lay property, not coming within the operation of the 28th (a)

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(a) " Provided always, that nothing in this act contained shall extend to entitle the assignee or assignees of the estate and effects of any such prisoner, being a beneficed clergyman or curate, to the income of such benefice or curacy for the purposes of this act. Provided nevertheless, that it shall be lawful for such assignee or assignees

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clause of the Insolvent Debtors' Act, but within the 11th (a) clause. In one or other of these ways the assignees are entitled to claim these arrears.

PARKER, B.—All you want is an authority that the sequestrator is entitled to claim bygone arrears of tithes.

Harrison.—There is no case precisely in point. *Doe*

to apply for and obtain a sequestration of the profit of any such benefice for the payment of the debts of such prisoner; and the order of adjudication made in the matter of such prisoner's petition, in pursuance of this act, shall be a sufficient warrant for the granting of such sequestration, without any writ or other proceedings to authorize the same, and such sequestration shall accordingly be issued, as the same might have been issued upon any writ of *levari facias*, founded upon any judgment against such prisoner."

(a) "That such prisoner shall at the time of subscribing the said petition duly execute a conveyance and assignment to the provisional assignee to the said Court, in such form as is to this act annexed, of all the estate, right, title, interest, and trust of such prisoner, in and to all the real and personal estates and effects of such prisoner, both within this realm and abroad, except the wearing apparel, bedding, and other such necessities of such person and his or her family, and the working tools and implements of such prisoner, not exceeding

in the whole the value of 20*l.*, and of all future estate, right, title, interest, and trust of such prisoner, in or to any real and personal estate and effects, within this realm or abroad, which such prisoner may purchase, or which may revert, descend, be devised, or bequeathed, or come to him or her, before he or she shall become entitled to his or her final discharge, in pursuance of this act, according to the adjudication made in that behalf; or in case such prisoner shall obtain his or her discharge from custody without any adjudication being made in the matter of his or her petition, then before such prisoner shall be at large, and out of custody, and of all debts due or growing due to such prisoner, or to be due to him or her before such discharge as aforesaid; which conveyance and assignment, so executed as aforesaid, in form aforesaid, shall vest all the real and personal estate and effects of such prisoner, and all such future real and personal estate and effects as aforesaid, of every nature and kind whatsoever, and all such debts as aforesaid, in the said provisional assignee."

d. *Morgan v. Black* (a) may be referred to as incidentally admitting the position contended for to be good law. Secondly, as to the claim of *Nokes*, the assignees contend that he is not a sequestrator at all, unless a *levari facias* has the same effect as a sequestration published; besides, the debt is due on a warrant of attorney given for costs, and therefore the bill of costs should have been taxed.

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ALDERSON, B.—Suppose a sequestration on the demise of an incumbent, is there any difference in form between that and a sequestration by the bishop to levy debts? In the former case, the sequestrator could not be entitled to the arrears due to the late incumbent.

Harrison.—There is no difference in form; but in the former case the executor would have been entitled to the arrears. In the latter, they are due to the insolvent, and therefore pass to the assignees, either as ecclesiastical property under the 28th section, or as a *chose in action* under the 11th.

Addison for *Nokes*.—*Nokes* regularly lodged his writs with the bishop, with directions to publish them, and therefore, if they have not been published, it was not for want of care on the part of *Nokes*, but he has been deceived by the bishop. The claim of the assignees was subject to *Nokes's* claim: at the time *Nokes's* sequestration was lodged with the bishop, *Britten's* sequestration was in operation. His sequestration was afterwards set aside, and the arrears had accrued before. A sequestration is similar to a *feri facias*, and the bishop is like the sheriff, and the Court exercises the same power over the bishop as it does over the sheriff. *Rex v. Bishop of London* (b).

(a) 3 Campb. 447.

(b) 1 Dowl. & Ryl. 486.

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So where there are two *fi. fa.*'s, and the sheriff levies under the first writ, which is afterwards set aside, the levy under the first writ is applicable to the second. So here, if the arrears were leviable under *Britten's* sequestration, when that was set aside they became applicable to *Nokes's*, which was then in the office. It was said that the sequestration was not then returned or published, but it may be published after the return; *Bennett v. Apperley (a)*; where it is said that publication binds as against third persons, but, as against the defendant, the writs themselves bind the property; and therefore *Nokes's* writs were a lien on the property, and Mr. *Nokes* is entitled to claim the arrears.

The *Attorney-General* in reply.—The sequestration was no lien on the property. A *fi. fa.* is only so by act of Parliament. If *Bishop v. Hatch* is good law, the assignees could have no title until the publication of the sequestration. The Court of *King's Bench* ordered no further proceedings, because the sequestration operates upon the future arrears; before the sequestration was granted to the assignees, *Britten's* sequestration was wholly set aside. The only question is, whether the sequestrators are entitled to claim arrears of tithes; but no authority has been cited to shew that they are; it is contrary to the principle of law that a *chose in action* should be transferred. These arrears were therefore vested in the incumbent, and did not pass.

Lord LYNTHURST, C. B.—The sequestration of the assignees not having been published till *January 12th*, the assignees cannot claim the arrears in question, unless the writ has a retrospective operation. No authority has been cited for that position, and the very form of the writ

(a)' 6 B. & C. 631. See also *and Saunders v. Bridges*, 3 B. & Jones v. Atherton, 7 Taunt. 56; Ald. 95.

shews that it cannot. The arrears belong to the rector. *Nokes* can have no title, because the sequestration has not been yet published.

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PARKE, B.—*Britten* being removed, the question is whether those arrears passed to the assignees. No authority has been shewn for the retrospective operation of the sequestration. It is clear that nothing passes but arrears due to the rectory, and not those due to the rector. The compositions for tithes do not pass to the sequestrator, but to the rector.

ALDERSON, B.—I am of the same opinion. *Britten* is bound whether he has been served with the rule or not.

GURNEY, B., concurred.

LORD LYNTHURST, C. B.—There must be judgment for Dr. *Wait*, and he must have the costs of the actions from the defendants up to the time of their paying the money into Court, and the other costs from the assignees; the subsequent costs must be paid equally by *Nokes* and the assignees.

Judgment accordingly.

LYONS v. COHEN.

THIS was an action of debt on a bill of exchange by the drawer against the acceptor, payable to the drawer's own order; there were also the common counts in debt. The defendant demurred in this form: "The defendant by his attorney says, that the declaration is not sufficient

A defendant, after having had time to plead, demurred to the declaration, which was in debt on a bill of exchange with the common counts, in

this form: "The defendant by his attorney says, that the declaration is not sufficient in law; and also that an action of debt will not lie, and that the bill should have been stated to be for value received."—*Held*, that the plaintiff was not justified in signing judgment as upon a sham demurrer.

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in law;* and also that an action of debt will not lie, and that the bill should have been stated to be for value received." The plaintiff had signed judgment.

Kelly having obtained a rule *nisi* for setting aside the final judgment, and that the costs should be paid by the plaintiff's attorney—

R. V. Richards shewed cause.—This demurrer was pleaded after two orders for time to plead. It is a special demurrer, and the causes are frivolous; the plaintiff was therefore entitled to treat it as a sham demurrer, and sign judgment.

Kelly, contra.—The causes of demurrer are stated in obedience to the late rule; they were only intended as a marginal note (a).

PARKE, B.—This is a general demurrer, and not frivolous; if it was, it should have been set aside as such. The plaintiff may amend on payment of costs.

Amendment allowed on payment of the costs of this rule and the demurrer.

(a) It appeared that the part copied (by mistake), as if it was a following the *asterisk* had been part of the demurrer.

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NORTON v. CURTIS.

THIS was a motion on behalf of the bail in this action, to be allowed to file the bail-piece *nunc pro tunc* on payment of costs. The action was brought more than fifteen months since. The defendant was rendered in due time, and notice was given, but the bail-piece was not filed. The assignment of the bail-bond was not taken till two months since, and proceedings had been commenced against one of the bail. The defendant and one of the bail had become insolvent.

Where bail made a motion in the name of an attorney, who denied having given any authority to allow his name to be used, the Court discharged the rule; but refused to make an order for costs against the person making the affidavit, on the ground that he was not before the Court. To obtain such costs, a special application must be made against him.

Kelly shewed cause, and objected that the application purported to be made in the name of *Warren*, an attorney; but *Warren* denies that he has given any authority to use his name, and there has been no order to change the attorney.

C. Jones, in support of the rule.—Any attorney would do for the purpose of this motion. The affidavit is made by *Beames*, as clerk to one *Bowden* an attorney.

PARKE, B.—This application is made by the bail in the name of *Warren*. He denies that he lent his name either to *Beames* or *Bowden*, and all the proceedings are in the handwriting of *Beames*. If a party means to come in person he should do so, and not use the name of an attorney without his authority.

ALDERSON, B.—They ought to employ an attorney of the Court. The rule must be discharged, but without costs.

Kelly applied to have costs against *Beames*.

PARKE, B.—He is not before the Court. We make

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no order about them. You may make a special application against him if you think proper.

Rule discharged without costs, and proceedings stayed for a week.

—◆—
 MACHER v. BILLING.

A plea of the Statute of Limitations requires to be signed by counsel.

The general issue being pleaded to part of a declaration, and the Statute of Limitations to the remainder, without the signature of counsel:—*Held*, that the whole plea was a nullity.

If a plea is delivered, but informal in some respects, as in not being signed by counsel when it ought to be signed, the plaintiff cannot forthwith sign judgment as for want of a plea, but must wait till the time for pleading is out.

THIS was a motion to set aside an interlocutory judgment for irregularity, it having been signed after a plea had been delivered. The action was in *assumpsit*, the first count on a promissory note, and the others were the common money counts. The defendant pleaded the Statute of Limitations as to the first count, and the general issue as to the remainder. The pleas were not signed, and had been treated as a nullity by the plaintiff.

Chilton shewed cause, and contended that the plaintiff was justified in signing judgment, the Statute of Limitations being a plea which required the signature of counsel.

Baxett, contra, urged, that the Statute of Limitations was one of those common pleas which did not require to be signed. He cited *Leigh v. Monteiro (a)*, where it was held that a plea of bankruptcy did not require to be signed.

PARKE, B.—The plea of bankruptcy concludes to the country, but a plea of the Statute of Limitations does not, and requires counsel's signature.

LORD LYNTHURST, C. B.—The officer says it is the practice to have a plea of the Statute of Limitations signed.

(a) 6 T. R. 496; 1 Chit. 225. held that it did. *Pitcher v. Martin*, 3 Bos. & P. 171. But in the Common Pleas, it was

Bazett.—The judgment is irregular, because it was signed as to the whole declaration, there being a good plea as to part, even if the other plea ought to have been signed.

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PARKE, B.—Both pleas make together but one plea; and, as the plea of the Statute of Limitations required to be signed, the whole plea was void (a).

Bazett.—The judgment was signed too soon. The declaration was delivered on the 28th of *October* to plead in four days. On the 31st, a week's time to plead was obtained, and on the 3rd of *November* an order for particulars, which were not delivered till the 7th; and therefore, as the defendant had the same time for pleading after the delivery of particulars as he had before, the judgment which was signed on the 10th was signed too soon. He cited a recent case of *Pepperell v. Burrell* (b), where a judgment was set aside as irregular, because it

(a) In *Spencer v. Cartlick*, which was an action on a promissory note, with a count on an account stated, the defendant pleaded a plea of no consideration to the first count, and the general issue to the last, and delivered them unsigned by counsel. On a summons before *Patteson, J.*, at Chambers, to set aside a judgment which had been signed on the whole declaration for want of a plea, because the first plea required a signature, that learned Judge expressed an opinion that the judgment was signed for too much, and the judgment was set aside. *Hughes* for the plaintiff. *Peacock* for the defendant. June 15, 1834. But upon the principle

of *Cuming v. Sharland*, 1 East, 411, and *Waterfall v. Globe*, 3 T. R. 305, where it was held, that, if a defendant, who is bound to plead issuable pleas, pleads several, some of which are issuable and others not, the plaintiff may treat all the pleas as a nullity and sign judgment, a defendant, it is conceived, would be equally entitled to sign judgment where several pleas are pleaded unsigned, one of which requires to be signed by counsel, and, à fortiori, where there are pleas to different parts of the declaration, which together make but one plea in law, and one of them is bad for not being signed by counsel.

(b) Ante, Vol. 2, p. 674.

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was signed before the time for pleading had expired, though an irregular plea had been delivered.

Chilton, contra, contended that the delivery of pleas by the defendant before the time for pleading was a waiver of the further time which he otherwise would have had, and, the plea being a nullity, the plaintiff was at liberty to sign judgment immediately; and that he said was the practice in the *King's Bench*.

LORD LYNDHURST, C. B.—The case cited is precisely in point; but we will postpone our decision, as it is intimated that a different practice has existed, and it is proper that there should be some uniform rule on this subject.

Cur. adv. vult.

PARKE, B., on the last day of term delivered the judgment of the Court.—The question in this case is, whether, where a defendant pleaded a plea which was a nullity in consequence of its not being signed by counsel, the plaintiff was therefore entitled to sign judgment immediately, without waiting till the time for pleading was out. There are certainly two old cases in the *King's Bench*, in which it appears to have been considered that he could. On the other hand, a case was cited, which was decided in this Court last *Trinity* Term, of *Pepperell v. Burrell* (a), in which it was expressly held, that a judgment signed under the circumstances of the present case, before the time for pleading was out, was irregular, and it was set aside on that ground. We have made inquiries into the practice of the *King's Bench*; and find that it is in conformity with the last decision in this Court, and that the defendant has the whole time for plead-

(a) 2 Dowl. P. C. 674.

ing to put in a proper plea, and therefore this rule must be made absolute, and the decision of this Court is confirmed.

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Rule absolute (a).

(a) The question whether a judgment might be signed immediately after a bad plea has been delivered, without waiting till the time for pleading had expired, seems to have been considered a disputed point; but we have been unable to discover any case in which it can be said that that point has been brought directly before the Court, and decided in such a way that the above decision can be said to have overruled it. There are several cases which appear to support the opinion that judgment might be signed, though the time for pleading had not expired; but in most of them it will be found that judgment was not in fact signed till after the time for pleading had expired, and some were decided under peculiar circumstances. The case of *Lockhart v. Mackreth*, 5 T. R. 661, is sometimes cited to shew, that, where a defendant pleads a plea irregularly, so that it may be treated as a nullity, the plaintiff may sign judgment before the time for pleading has expired; but it will be found that that was not the point there decided. The declaration there was delivered on the 30th of May, with notice to plead in four days. The defendant demanded oyer of the bond on which the plaintiff declared, which was given on the

same day; no further time for pleading was obtained, and the judgment for want of a plea was signed on the 14th of June, after the time for pleading had expired. The point there raised was this:—the defendant having on the 5th of June made an entry in the general issue book thus, “the defendant pleads the general issue of solvit ad diem,” which was held to be clearly irregular, as being a special plea, which ought to have been delivered, it was endeavoured to be contended that the judgment was irregular, because the defendant was entitled to an imparlance; but the Court held that the defendant by pleading that plea had waived his right to imparl. The right to imparl stood upon a very different footing from the right to time for pleading. The latter is absolutely necessary to a defendant to enable him to prepare a plea; and he is entitled to it under all circumstances. An imparlance is a period of time which the defendant was entitled to crave, not for the purpose of pleading, or for any useful purpose, but merely for the purpose of delay; and was only granted to a defendant upon the assumption that the plaintiff had himself been guilty of delay, (Per Cur. 2 B. & Ald. 391). and was a sort of punishment inflicted upon him for

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having unnecessarily delayed the cause; and, therefore, where a defendant himself had been guilty of delay, he was not entitled to an imparlance. *Page v. Vogel*, 2 B. & Ald. 390; *Rolleston v. Scott*, 5 T. R. 372. So the Court would never give a rule for an imparlance, but the defendant was obliged to take it or not at his peril. *Phillips v. Hardinge*, T. 24 Geo. 3; and *Boyd v. Gordon*, cited Tidd, 467. The Courts seemed to have looked upon an imparlance as an engine of delay, which the defendant might or might not avail himself of as he chose; and from time to time the defendant's right to imparl was narrowed until, by the late act of Parliament, imparlances were entirely abolished. See *Nurse v. Geeting*, ante, p. 157, overruling *Frean v. Chaplin*, ante, Vol. 2, p. 523. The Court only decided, in *Lockhart v. Mackreth*, that a defendant, by pleading a plea, shewed that he did not intend to claim an imparlance, which ought to be done before plea pleaded. *Edensor v. Hoffman*, ante, Vol. 1, p. 304, 2 Cr. & J. 140, S. C., is an exactly parallel case with *Lockhart v. Mackreth*, and therefore is distinguishable on the same grounds from the principal case.

In an *Anonymous* case in the Practical Register, p. 282, it is said, that the Judges in the Treasury declared, that if a plea, which ought to have a counsel's hand, be delivered without, or if any plea which ought to have an affidavit annexed be delivered without, the plaintiff may instanters sign

judgment as if no plea had been delivered, *without any application to the Court for leave*. That case is evidently intended only as an authority that no application to a Judge is necessary, and that a plea, without a counsel's signature, may be treated as if *no plea at all had been delivered*, in which case judgment could not have been signed till the time for pleading was out. *Brandon v. Payne*, 1 T. R. 689, and *Richards v. Settree*, 3 Price, 197, were cases of irregular pleas in abatement, and judgment was not signed till the time for pleading in abatement had expired; and those cases, therefore, are no authority upon the principal point. A party has his option to plead either in abatement or in bar, but he cannot do both; having elected to plead in abatement, he was bound by the time allowed for that purpose, and, having delivered bad pleas in abatement, the plaintiff signed judgment after the time for pleading in abatement had expired; and pleas in abatement are looked at with great strictness and no favour, not being pleas to the merits of the action. In *Perry v. Fisher*, 6 East, 549, it does not appear when judgment was signed; it was there held that a rule to plead having been delivered before declaration, the defendant could not after pleading a bad plea object to the rule to plead.

In *Samuels v. Dunne*, 3 Taunton, 386, the defendant first filed a plea of the general issue to the whole declaration. He then filed

several other special pleas, and afterwards filed a plea of non assumpsit to the first count, and a special demurrer to the other counts. The plaintiff's attorney, on searching for a plea, found only the special demurrer, with the general issue to the first count, and after the time for pleading was out signed judgment, because the demurrer was not signed by counsel; and upon an affidavit that he was misled, and was ignorant of the former pleas having been filed, the Court refused to set aside the judgment, *because the second plea was so pleaded as to deceive the plaintiff*; but it was not made an objection, nor was it held by the Court, that the mere fact of filing additional pleas within the time allowed for pleading was irregular, or that the plaintiff would have been justified in taking no notice of the subsequent pleas. If, therefore, the defendant could avail himself of the additional time to add other pleas, there seems to be no good reason why he should be deprived of the opportunity of rectifying a mistake in the original by redelivering it or refileing it.

A plaintiff who signs judgment when a plea in chief is pleaded, but irregularly, (as where it has no counsel's signature, if the plea be such as to require it), does so on the assumption that there is no answer to the action; if there were no plea at all, it is clear that he could not have signed judgment till the time for pleading was out. Why then should he be in a better condition when there

is in fact a good plea delivered, but, for some irregularity in the mode of pleading it, it is treatable as a nullity? But it is said that the defendant has thereby waived the remainder of the time allowed him; the question, however, is, whether he ever intended to do so? If he did, it could only be on the assumption that the plea already put in was a good plea; and when it turns out to be mere waste paper, no such assumption can fairly be made against him. It is also sometimes alleged in answer that the defendant did not in fact plead another good plea within the proper time; but the answer to that is, that the plaintiff having already signed judgment, that must be removed before another plea could be put in with effect; the defendant has made a slip, of which it would have been as well if the plaintiff had apprised him, as was said by Mr. Baron Gurney in *Heane v. Battersby*, post. At all events the plaintiff, by taking such a step as signing judgment within the time allowed for pleading, has wrongfully deprived the defendant of a locum penitentiae, of which it has not unfrequently happened in practice that the defendant has availed himself, and, before the time for pleading has expired, he has discovered the mistake, withdrawn the bad plea, and substituted a good one. Besides the case of *Pepperell v. Burrell*, there was a previous case in the Exchequer, of *Nolleken v. Severn*, 2 Cr. & J. 333, ante, Vol. 1, p. 321, S. C., where the same point was

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determined; there a plea was pleaded before appearance, and the plaintiff immediately signed judgment, treating the plea as a nullity; but, because the time for

pleading had not expired, the Court set aside the judgment for irregularity in having been signed too soon. The point, therefore, may now be considered as settled.

STEIN v. YGLESIAS.

In an action by indorsee against acceptor, a plea that the bill was accepted for the accommodation of the payee, and without any consideration, and that it was indorsed after it became due, was held bad on demurrer; and also another plea, that the bill was indorsed after it was due, and that the payee at the time of the indorsement was indebted to the defendant in a larger sum than the amount of the bill.

THIS was an action on a bill of exchange by the indorsee against the acceptor. The defendant pleaded that the bill was accepted for the accommodation of *Douglas* the payee, and without any consideration; and that it was indorsed to the plaintiff after it became due. The plaintiff demurred. The defendant also pleaded that the bill was indorsed to the plaintiff after it became due, and that the payee at the time of the indorsement was indebted to the defendant in a larger sum than the amount of the bill; to this also the plaintiff demurred specially.

PARKE, B.—The last plea is bad according to *Burrough v. Moss* (a). As to the first plea, if the bill was accepted for accommodation after it became due, there is no reason why it should not be good in other persons' hands. If before, there might have been an implied understanding not to circulate it after it was due. The plea may be amended by inserting that the bill was accepted before it became due, and the agreement, if the facts warrant it.

Judgment for the plaintiff.

Barstow, for the demurrer.

Hoggins, *contra*.

(a) 10 B. & C. 558.

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COLSTON v. BERENS.

HOGGINS applied for leave to amend a writ of *capias*, which was directed to the Sheriff of *Middlesex*, instead of *Middlesex*. The defendant had applied at Chambers to have the writ set aside, and to be discharged out of custody; and Mr. Baron *Bolland*, on the authority of a case of *Hodgkinson v. Hodgkinson (a)*, in which the same objection was held to be fatal, discharged the defendant out of custody and set aside the writ.

The Court will not amend a writ of *capias* in the direction. *Semble*, that *Middlesex*, (put by mistake for *Middlesex* in a writ of *capias*,) does not vitiate the writ, so as to entitle the defendant to set it aside, and to a discharge from custody.

PARKE, B.—The writ cannot be amended. You had better take the opinion of the Court upon the point whether the objection is a good one: the mistake cannot mislead. Take a rule for setting aside the order of Mr. Baron *Bolland*.

BOLLAND, ALDERSON, and GURNEY, Barons, concurred.

Rule *nisi* accordingly.

No cause was shewn against the rule, and it was afterwards made absolute.

(a) Ante, Vol. 2, 535.

LLOYD v. KEY.

R. v. RICHARDS applied for a rule to shew cause why a *mandamus* should not issue at the instance of the defendant to examine a person of the name of *Friend*, re-

Where a witness resides abroad at such a great distance that a commission

sent out to examine him would necessarily occasion great delay, it is not a matter of course to grant such a commission on the application of the defendant, but it must be made out to the satisfaction of the Court that the evidence of the witness would be admissible, and of service to the defendant when obtained; and therefore, where in an action on a bill by the indorsee against the acceptor, the defendant applied for a commission to examine the drawer in *Upper Canada*, to shew that there was nothing due from the defendant to him, and it was sworn that it was believed that the plaintiff had not given value, but, upon a former hearing before a Judge at Chambers, it appeared to him that the plaintiff had given value, the Court refused to interfere.

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siding in *Upper Canada*, and who was sworn to be a material and necessary witness on behalf of the defendant in this action. The defendant was sued as acceptor of a bill of exchange by the plaintiff as indorsee. *Friend* was the drawer of the bill; and it appeared that he had sold his business to the defendant, who had accepted the bill for the value of the business. A similar motion had been made last term upon the common affidavit, but, from the affidavits in answer, it appeared as if the motion had been made for delay; it was ultimately heard before *Bolland*, B., at Chambers, and that learned Judge had refused to grant a *mandamus*, because he considered that the plaintiff's affidavit shewed a sufficient consideration for the indorsement of the bill to him. The motion was now renewed on special affidavits; and it was said that the only question intended to be inquired into before *Bolland*, B., was, whether the motion was for delay or not. It was now alleged, that, as between *Friend* and the defendant, it clearly appeared that the former had no right to recover on the bill; and the affidavit of the defendant's attorney stated that he believed the defendant had a good defence to the action, and that the motion was made *bonâ fide* and not for the purpose of delay; that he did not believe that the plaintiff had lent any money to *Friend*, and that the plaintiff was *Friend's* attorney. There was a further affidavit of a person of the name of *Johnson*, who swore that nothing was due by the defendant upon the bill. It was contended that the defendant was entitled to the commission as a matter of right.

PARKE, B.—Where a witness resides at such a great distance as the witness does in the present instance, it ought to be clearly made out to the satisfaction of the Court, not only that the evidence which the witness is expected to give is material and necessary, but also that it is admissible. Mr. Baron *Bolland* seems to have thought that the plaintiff would at all events have been entitled to

recover, and it does not appear that the case is at all improved since it was heard at Chambers. It appears to me, that you have not shewn sufficient materials to induce the Court to grant a rule.

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The other Barons concurred.

Rule refused.

THE KING v. MARY GROTE.

ADOLPHUS moved to discharge the recognizance entered into by the defendant. It appeared that she had been assaulted by the prosecutor, who had been tried and heavily fined. The present defendant was then indicted for perjury, and the recognizance was conditioned that she should appear in the *King's Bench* in *Trinity* Term and try the indictment. She had personally appeared on the return of the *postea*, and had pleaded, but no trial had taken place.

Where a defendant entered into a recognizance to appear to and try an indictment for perjury against her in *Trinity* Term, and she had appeared and pleaded to the indictment, but the indictment had not been tried, the Court would not in *Michaelmas* Term discharge the recognizance, but ordered

PARKE, B.—All we can do is to respite the recognizance from being put in suit till the last day of the term.

that it should not be put in suit before the last day of the term.

THE KING v. WILSON and Another, late Sheriff of
 MIDDLESEX, in a Cause of ROGERS v. PORTER.

THIS was a rule which had been obtained by *Mansel*, calling upon the plaintiff to shew cause why the attachment

The 4th rule of *Trinity* Term, 1 *Will.* 4, which directs,

that, if a plaintiff does not give one day's notice of exception, where the bail justify by affidavit under the new rules, the recognizance may be taken out of Court, does not apply where the bail are put in in that mode after the regular time for putting in bail has expired, for then the bail must actually justify as formerly, before a motion can be made to set aside proceedings upon the ground that bail have been put in and justified.

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issued against the late sheriff of *Middlesex* should not be set aside, on the ground that it had been obtained after bail had been put in and justified.

John Jervis shewed cause.—He contended that the bail had not justified. The time for putting in bail expired on the 5th of *September*. Special bail was put in on the 15th; and the notice of bail was accompanied by an affidavit, according to the form given by rule 3 of *Trinity Term 1 Will. 4*, copies of which were duly served. No notice of exception was given by the plaintiff, but before the bail were put in the sheriff had been ruled to return the writ and bring in the body, and the attachment had issued for default of the sheriff. The only question was, whether the plaintiff not having excepted to the bail, they were to be considered as having justified. This question turned upon the construction of the Rule 4 of *Trinity Term 1 Will. 4*, which ordered, that, if the plaintiff should not give one day's notice of exception to the bail by whom such affidavit should have been made, the recognizance of such bail might be taken out of Court without other justification than such affidavit. It was said there had been a great difficulty in understanding what that rule meant, and that it had been supposed at one time to apply to those cases only where the bail was bound to justify without any exception, as in the case of prisoners, or where bail were put in after the time for putting in bail had expired. In the case of *Webb's Bail* (a), however, *Patteson, J.*, held that the rule did not apply to the cases where notice of exception was not necessary, and that being the case of a prisoner, he held that the bail must justify though no exception had been made; that decision, therefore, is an authority to shew that in the present case, though no exception had been made, the bail were bound to justify, hav-

(a) Ante, Vol. 1, 446.

ing been put in after the time for putting in bail had passed. He also contended, that, in the present case, that rule could not be relied upon on the other side, because in fact the recognizance of bail was still in Court, and it is also sworn that a trial has been lost.

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Mansel, in support of the rule.—A mere omission of that sort ought not to be allowed to prejudice the bail. The rule is general in its terms, and applies to all cases where bail are put in in the mode prescribed by the previous rule: that is, where the notice of bail is accompanied by an affidavit of each of the bail in the form given in the schedule, which was the mode in which the bail were put in in the present case; the bail therefore have justified. He referred to *Lawson v. Case (a)*, where the construction of another rule of Court respecting the addition of other defendants was in question, which rule was general in its terms, and Lord *Lyndhurst* there said, that the only safe way of construing the rule was to adhere strictly to the letter of it, and held that it applied to every affidavit. In the present case, unless the Court give to this rule the construction for which I am contending, it will be perfectly inoperative.

PARKE, B.—The rule applies to those cases only where an affidavit is filed pursuant to the rule; the object of the rule was to put the justification of bail by affidavit under the new rules in the same state as the justification of bail was previously. It was merely introduced for the sake of greater caution. By the practice of the Court, where the time for putting in bail had passed, it was necessary that the bail should justify without exception; and justification is still necessary before a motion can be made to set aside proceedings, which is an application to the favour of the

(a) Ante, Vol. 2, p. 40; 1 C. & M. 481, S. C.

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Court, the sheriff having made default. After the bail have justified, another application may be made; but the present rule must be discharged with costs.

BOLLAND, ALDERSON, and GURNEY, Barons, concurred.

Rule discharged, with costs (a).

(a) See Chitty's Archbold's Practice, 3rd ed. 158, n. (b).

ALANSON v. WALKER.

An affidavit of service, by leaving a rule at the defendant's chambers with a female servant there, held insufficient.

THE affidavit of the service of a rule stated it to have been by delivering it to a female servant at the chambers of the defendant in *Austin Friars*. The officers doubted whether that was sufficient.

Mansel cited *Warren v. Smith* (a), where service on the mother of the defendant at his residence was held sufficient; and *Pagett v. Hill* (b), where the service was by leaving the rule at the place where the defendant's family still resided, though he himself had gone away.

GURNEY, B.—The servant here may have been a mere laundress.

Rule refused.

(a) Ante, Vol. 2, p. 216.

(b) Id. 688.

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DIXON v. LEE.

A RULE *nisi* had been obtained by *Alexander* for an attachment against a witness of the name of *Ann Dixon*, for disobedience to a *subpoena*.

Cresswell shewed cause. — He objected, in the first place, that it did not appear that the witness was called on the *subpoena*. The affidavit merely stated that she was called three times in open Court. He relied upon *Malcolm v. Ray* (a). In that case, the crier had indorsed on the record—"Called three times;" and it was held that that was not sufficient; that the affidavit should be express to bring a party into contempt, and that it ought to have stated that the witness was called on her *subpoena*.

PARKE, B.—If that case is not overruled, it has been so much shaken that it can scarcely be cited again as an authority. In *Barrow v. Humphreys* (b), it was the opinion of *Holroyd* and *Best*, Justices, that a witness is guilty of contempt by not attending, though the cause is not called on.

Cresswell.—Upon the facts of the case the rule must be discharged. It is distinctly sworn, that the distance from the place where the witness lived to *Lancaster*, where the trial was to take place, is sixty miles by the regular road, and only 2*l.* 1*s.* were tendered to her for her expenses. It is also sworn that she had an infant very ill, which she must have taken with her; and that the

Upon a motion for an attachment against a witness (for disobedience to a *subpoena*) in not attending at the trial, an affidavit that she was called three times in open Court is sufficient, without alleging that she was called upon the *subpoena*.

A witness is entitled to her reasonable expenses for travelling in the mode suited to her station of life and the particular circumstances in which she may be placed; and therefore where the wife of an innkeeper was subpoenaed to attend a trial at *Lancaster*, which was sixty miles distant by the high road, and fifty by a more direct one, and she was tendered 2*l.* 1*s.*, (the outside fare by the coach by the latter road being only 1*l.* 6*d.*), but it appeared that she had a sick child who must

have travelled with her, and the money tendered was insufficient if she travelled inside, a rule for an attachment against her was discharged, but without costs, as she took the money tendered, and made no objection at the time.

(a) 3 Mo. 222.

(b) 3 B. & Ald. 800.

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sum tendered was insufficient to pay even for the traveling expenses, which alone would have amounted to 50s. inside by the coach which goes the direct road to *Lancaster*. The *subpoena* was only served on the 13th, and the trial was to take place on the 15th. The allowance on taxation of costs is at least 6*d.* a mile. According to the affidavits on the other side, the distance is stated to be only fifty miles, but that is not by the direct road. It is also stated that the fare by the coach which goes that road would be 11*s.* 6*d.* and no more, but that is only for an outside place; and the witness, who is the wife of a respectable innkeeper, and obliged to take a sick child with her, could not be expected to travel on the outside. It is clear, therefore, that the amount of money tendered was not sufficient to cover the expenses of her journey to *Lancaster* and back, and of her stay there; and the rule must be discharged.

PARKE, B.—The Master only allows what is actually paid.

Alexander, in support of the rule.—As to the sufficiency of the tender, it is expressly sworn that the fare one way outside is only 11*s.* 6*d.*; the 2*l.*, therefore, would cover the expenses of the journey there and back, and leave enough to support her at the place; and in the situation of life of the witness, it might fairly be supposed that she would have no objection to travel on the outside of a coach in the month of *August*. But she accepted the money, made no objection at the time, and thereby led us to suppose she would attend; instead of which she made no effort to attend, though she does not swear she had not the means. If she had refused, we might have withdrawn the record; instead of which the cause was called on, and a verdict passed against us, which her evidence would have prevented; she is, therefore, clearly in contempt, as she should have made the objection at the time.

PARKE, B.—It could scarcely be expected that the wife of an innkeeper should travel on the outside; but it clearly appears that she was not in a condition to do so. The money tendered, therefore, was not sufficient to cover her necessary expenses.

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BOLLAND, B.—In *Ashton v. Haigh* (a), it was held that the whole expenses must be tendered to a witness who lives at a distance, in order to ground an attachment against him for not obeying a *subpoena*.

ALDERSON, B.—In *Malcolm v. Ray* the party had been in Court, and perhaps the Court thought he ought to have had distinct notice that he would be wanted as a witness (b). Calling out the name of a party who is not in attendance would be perfectly useless.

GURNEY, B.—The witness was entitled to her expenses both ways.

Rule discharged, without costs.

(a) 2 Chit. Rep. 201.

pear by affidavit that he had been

(b) In that case it did not ap-

called at all.

OLIVER v. PRICE and Others.

UDALL moved for judgment as in case of a nonsuit upon an affidavit in which the word "oath" was accidentally omitted in its proper place. It ran thus:—*A. B.*, of &c., maketh and saith &c. He submitted that the word "saith" was sufficient, as the affidavit appeared to be sworn; but

An affidavit, in which the word "oath" was omitted, was held insufficient.

PARKE, B., observing that the word "oath" was an important word, refused the rule.

Rule refused.

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WARNER v. WOOD and BLAKE.

A rule drawn up in one term to shew cause in another is put into the peremptory paper, and parties ought to be prepared to shew cause on the day for which the rule is drawn up, and not on the following day, as is usual in other cases.

A RULE *nisi* for setting aside the verdict for the plaintiff against both these defendants was obtained towards the end of last *Trinity* Term, and the rule was drawn up for shewing cause on the 2nd day of this term. *Platt* was then heard as counsel for *Wood*, and no counsel appeared for the other defendant *Blake*. The Court, being of opinion that he was clearly liable, and that *Wood* was not, discharged the rule, on the plaintiff undertaking not to take out execution against *Wood*. On the evening of that day, a brief was delivered to counsel on behalf of *Blake*. Upon an affidavit of this fact, and that the attorney was misled, upon the supposition, that, though the rule was drawn up for *Tuesday*, cause would not be shewn till the following day, *Chandless* moved to be allowed to come in and shew cause on behalf of *Blake*.

PARKE, B.—It ought to be generally known, that, where rules moved in one term are drawn up to shew cause in another term, they are put into the peremptory paper, and cause must be shewn on the very day for which the rules are drawn up. It was through the negligence of the attorney that counsel was not instructed till after the case was disposed of. It is now wished to open the matter, not to shew cause upon the merits, but to take a technical objection to defeat the justice of the case. This is not a case in which the Court ought to lend any assistance, and therefore the rule will remain as it is.

The rest of the Court concurred.

Motion refused.

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Earl of LONSDALE v. WHINNAY.

THE defendant had been tenant to the plaintiff, and, on leaving the premises, a dispute arose respecting the amount of rent due and the state of repair in which the premises were left: the parties having referred the matter to an arbitrator, he awarded to the plaintiff a sum of 348*l*. Applications were made from time to time in a friendly manner for payment of the sum awarded; but the defendant refused to pay, and ultimately a rule was made absolute for an attachment against him, and upon which he was taken into custody. He however declared he would rather go to gaol than pay the money, although (as it was sworn) he was well able to do so. An action was subsequently commenced upon the award to recover the sum awarded.

If a party proceeds to enforce an award by attachment and afterwards by action, the attachment may be set aside, but only on the terms of the defendant's giving a bail-bond.

A rule having been obtained by *Dundas*, calling on the plaintiff to shew cause why the action should not be discontinued or stayed on payment of costs by the plaintiff to the defendant, or why the defendant should not be discharged out of custody—

Cowling now shewed cause.—There is no impropriety or inconsistency in the plaintiff's proceeding both ways under the particular circumstances of this case. The action has become necessary in order to proceed against the defendant's property in consequence of his wilful perverseness in going to gaol rather than pay the debt.

PARKE, B.—The plaintiff, I think, ought to be put to his election; and, if he goes on with the action, he ought to let the defendant out of custody absolutely from the attachment. In some old cases the Court seems to have thought that an action was a matter of right, and that therefore the plaintiff might proceed both ways.

Cowling.—I apprehend there is no case laying it down

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as an inflexible rule that both remedies should not be used together, and there is no reason why they should not. They are not inconsistent; the Court, therefore, will not stay the action unless the plaintiff has proceeded without a reason, and for the purpose of harassing the defendant. Here there is no hardship upon him; he is in precisely the same situation as if the plaintiff had not attached him, but proceeded in the action by bailable process, and the defendant had gone to prison rather than put in bail or pay money into Court. The hardship is on the plaintiff; for, if the defendant be discharged, the plaintiff, not having proceeded by bailable process, will have lost the opportunity of arresting him, to which he was entitled, and therefore the Court ought only to discharge the defendant on the terms of putting in bail, or paying the money awarded into Court. If the plaintiff had been proceeding by personal process in the action, or had obtained judgment, and had taken the defendant in execution upon it, there would have been an inconsistency; the plaintiff would have been proceeding against the defendant personally in both ways, and the Court would then have properly discharged the defendant. All the older cases seem to confirm this distinction; they are collected in *Paull v. Paull* (a), and the note to that case (b). *Anon.* 1 Salk. 73, *Webster v. Bishop* (c), *Richardson v. Clancey* (d). This distinction seems to have been recognised also by Lord Hardwicke in *Stock v. De Smith* (e), upon the principle that the plaintiff has had no satisfaction from the attachment. The Court will, therefore, put the plaintiff in the same situation as he would have been in but for the defendant's obstinacy.

Dundas.—The old rule certainly was as has been stated ;

(a) Ante, Vol. 2, 340.

(d) 1 Barnard. 386.

(b) Id. p. 342, n. (a).

(e) Cas. temp. Hard. 106.

(c) 2 Vern. 44.

but the rule now to be collected from the authorities, as stated in 2 Tidd, 833, is, that both remedies cannot be pursued at the same time, and therefore the defendant ought to be discharged absolutely.

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PARKE, B.—The defendant may be discharged if he chooses on giving a bond to the plaintiff, with sureties, to the satisfaction of the Master. As the defendant was not arrested, there may be some difficulty about it; but he must give a bond to the plaintiff, in the nature of a bail-bond, and the action may proceed.

ALDERSON, B., and GURNEY, B., concurred.

Rule absolute for setting aside the attachment on these terms.

KEMP v. FYSON.

HUMFREY shewed cause against a rule which had been obtained by *R. V. Richards*, calling upon the plaintiff to shew cause why the interlocutory judgment which had been signed should not be set aside for irregularity, and the plaintiff or his attorney pay the costs of this application, and also of another before *Littledale, J.* On *August* the 4th, the declaration was delivered, with notice to plead in four days. On the 9th, at 12 o'clock, judgment was signed. It was contended that the plaintiff was entitled to sign judgment in the morning of the 9th, and that therefore the judgment signed was regular.

A declaration was delivered on the 4th of *August* with notice to plead in four days:—*Held*, that judgment could not properly be signed till the afternoon of the 9th for want of a plea.

Richards, contra.—In vacation, the office not being open in the afternoon, the defendant had till the next day.

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PARKE, B.—The officer (a) says, that the judgment might have been signed in the afternoon, and not sooner.

ALDERSON, B.—The office might have been opened specially.

Rule absolute.

(a) Master Walker.

BLIGH and Others, Executors, v. BREWER.

A defendant on being arrested for the amount of a promissory note proposed to give bail, but being told that a *cognovit* would be cheaper, he consented to give a *cognovit*. He was then told, that it was necessary he should have an attorney present, and two attorneys were mentioned to him, and he said he did not care which he had; afterwards he called with the officer at the office of one of the two proposed attorneys, who asked him if he wished him to act as his attorney, to which the defendant answered "yes," and that attorney

CROWDER moved for a rule to set aside the *cognovit* given by the defendant in this action, and the judgment and execution thereon, on the ground that it was given by the defendant whilst he was in custody, no attorney being present on his behalf who was expressly named by him. It appeared by the affidavit, that the action was by the plaintiffs as executors on a promissory note given to the testator as a consideration for getting a place in the *Excise Office*, and that 60*l.* had been paid on account of the note, but no notice of that was taken in the *cognovit*. That the defendant, on being arrested for the amount of the note, had gone to the office of the plaintiffs' attorney, a Mr. *Bligh*, who was himself one of the plaintiffs; that he had originally proposed to give a bail-bond, and after some discussion left the plaintiffs' attorney's office, and went to a public-house; but he was then told, either by the sheriff's officer or some other person, that he had better give a *cognovit*; that a bail-bond would cost 7*l.*, and a *cognovit* only 10*s.* 6*d.*; that he proposed to send for Mr. *Code* an attorney, but *Bligh* said he had spoken to Mr. *Cumming* an attorney, and that if he had *Code* he

accordingly attended and acted for him; and the *cognovit* after having been read to him was signed by him and the attorney:—*Held*, that the rule of *H. T. 2 Will. 4, s. 72*, was complied with:—*Held*, also, that, after giving a *cognovit*, it was too late to object, that, at the time of the arrest, part of the note had been paid, and that the note was given for an illegal consideration.

would have to pay two attornies; that he never intended to give such a *cognovit*; that the attorney who signed himself as "*Cumming* the younger" was not his regular attorney, and that he knew nothing about him, and that the *cognovit* was not read over to him.

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PARKE, B.—The only ground on which you can move is, that there was no attorney present who was named by the defendant. His having paid 60*l.*, and then given a *cognovit* for the whole, and the consideration being illegal, are objections which cannot now be taken. There is a late case upon the subject. Upon the other point you may take a rule.

Humfrey, on a subsequent day, shewed cause.—It appeared from the affidavit in answer, that the conversation respecting the payment of two attornies was denied; that Mr. *Cumming* was an attorney of considerable standing and well known; that the defendant, on being told he must have an attorney, asked why; and, as they were going along the street, they met Mr. *Cumming*, and some one asked him if he could attend; and that the defendant went to Mr. *Cumming's* office, and that the *cognovit* was read once to him by Mr. *Cumming*; that the defendant said I do not care who I have, and made no objection to Mr. *Cumming*, and, on being asked if Mr. *Cumming* should attend, the defendant answered yes. He contended that there had been a sufficient compliance with the rule, otherwise no assent of any kind could ever be sufficient. If the defendant does not know the name of an attorney in the place, it is absolutely necessary that some one should be suggested to him; and when he expressly agrees to have one, he must be considered as expressly named.

Crowder, in support of the rule.—The question certainly is, whether the rule of Court in this case has been

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strictly complied with. . This rule has been in existence for a considerable time. In the case of *Hutson v. Hutson* (a), where it was held that the defendant's consenting to the plaintiff's attorney acting as his attorney was not a sufficient compliance with the rule, Lord *Kenyon* says, " I think it would have been more wise in deciding cases on the rule of *Geo. 2* to have adhered to the letter of it than to have gone into the circumstances of each particular case, especially as the rule was made to explain a former rule in the reign of *Charles 2*; since an explanatory rule, like an explanatory statute, should never be extended by construction. There is great weight in the observation made by the counsel in support of the rule, that the defendant under the pressure of an arrest ought to be considered incapable of waiving the benefit of this rule; and that at all events, and in all cases, he should be protected by the advice of an attorney expressly attending for him." The rule supposes that a defendant has not the free exercise of his judgment on such an occasion. *Walker v. Gardner* (b) is a strong authority in favour of the present rule: there a debtor, being arrested, offered a warrant of attorney; the plaintiff's attorney, who had also advised the defendant in previous stages of the business, came at his request to the place where he was in custody, and proposed another attorney whom he brought with him to read over the warrant of attorney to the defendant, and attest it on his behalf; the defendant acquiesced, but the attorney so introduced was not known to or sent for by him; and it was held, that there had not been a compliance with the rule. Here the plaintiffs' attorney carries *Cumming* with him to the defendant who was in custody of the officer. The case of *Fisher v. Papanicolas* (c), in which it was held that the assent of the defendant, that another attorney

(a) 7 T. R. 7.

(b) 4 B. & Ad. 371.

(c) 2 C. & M. 215; ante, Vol.

2, p. 251, S. C. nom. *Fisher v. Nicholas*.

(who was requested to attend by the defendant's attorney's clerk) should act for him, is not a sufficient compliance with the rule, but that it was necessary that the attorney should attend at the defendant's request, is decisive of the present case. According to the affidavit of *Cumming*, junior, himself, he admits that he was applied to by the clerk of the plaintiffs' attorney to attend the execution of the *cognovit*, which he said he would do, and wished them to call for him. Then he says, the defendant was asked if he wished him to attest it, and whether the *cognovit* should be read over to him. He said, he supposed it was the same that was read over to him before, and that there was no occasion for it. The defendant then signed the *cognovit*; and that he, *Cumming*, then signed it as the attorney for the defendant. The presence of *Cumming* was therefore procured by the opposite party. It is expressly sworn by the defendant that he wished to have *Code* for his attorney; that, however, is denied by the other side; but it appears that *Code* had attended before as his attorney, and that he had named two individuals as bail; to whom *Bligh* said he had no objection. *Code*, they knew, was obliged to go out of town, and that he had said he should be back at two o'clock; in the meantime the plaintiffs' attorney arrives, and produces a *cognovit* ready drawn, and *Code* is never sent for. In *Fisher v. Papanicolas*, *Bayley*, B., says, "Was the attorney expressly named by the defendant, and did he so attend? No part of the affidavit shews this; but, on the contrary, it appears that he attended at the request of *Barratt*, never having been named by the defendant." In no way, therefore, can it in the present case be said that *Cumming* was expressly named by the defendant; *Cumming* is forced upon him by the opposite attorney, and there is neither a literal nor substantial compliance with the rule.

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PARKE, B.—I am of opinion that the requisites of the rule have been complied with. The rule directs that no

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warrant of attorney or *cognovit actionem* given by any person in custody of a sheriff or other officer upon mesne process shall be of any force unless there be present some attorney on behalf of such person expressly named by him, and attending at his request. The first requisite is, that there should be an attorney on behalf of the person in custody; that is complied with here; there was an attorney for the plaintiff, and another attorney on behalf of the defendant, who was not the plaintiff's attorney. The other requisites are, that the attorney attending on behalf of the defendant was expressly named by him, and that he attended at his request. None of the cases cited bears expressly on the present. In *Walker v. Gardner*, the conversation, in which it was said that the defendants replied that they had no objection to the attorney, who, in fact, acted for them, was positively denied. That conversation may therefore be left out of the case, and it is plain that the Court did not take it into their consideration in their judgment on that case. In *Fisher v. Papanicolas* there was nothing said by the defendant; it was merely sworn that he did not object. There must be something expressed by the defendant. Here it appears that two attorneys are suggested to him, and the defendant says he does not care which; and afterwards, when Mr. *Cumming's* name was mentioned, and when he was asked if he should attest it, the defendant says "yes." Afterwards he goes to *Cumming's* office; that was a voluntary act on his part; he was not bound to go there. The defendant, therefore, expresses himself affirmatively respecting the attendance of Mr. *Cumming*, which is the same thing as if he had asked him in the first instance to attend. The object of the attorney's attending is to inform the defendant of the nature and consequence of the act which he is about to do; and therefore when he was asked by Mr. *Cumming* if he should read over the *cognovit*, and the defendant declined on the ground that it had been read over to him

before, there was clearly no occasion to go through the ceremony of reading it again. I am therefore of opinion that this rule should be discharged.

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BOLLAND, B.—The defendant certainly did not expressly name *Cumming*, but he went to *Cumming's* office for the purpose of advising with him. Merely going to his office, perhaps, would not have been sufficient; but *Cumming* asks the defendant if he wished him (*Cumming*) to act as his attorney, and he says "yes;" except for that, I should have thought the rule not sufficiently complied with.

ALDERSON, B.—When this case was before me at chambers I thought it a case of difficulty and doubt, and therefore referred it to the Court. Now, I entirely concur with the opinion already expressed. I have the same impression now upon my mind as I had then, that the attorney must be expressly named; but whether he was named or not must not be left to mere inference. In *Walker v. Gardner* an inference was endeavoured to be drawn from the fact that the attorney was paid by the defendant, and the Court held that that was not sufficient to satisfy the words of the rule. *Fisher v. Papanicolas* was also a case of mere inference, from the fact sworn to that the party made no objection; but a mere inference is not sufficient. The rule says "expressly named." The defendant here is asked "do you wish me to act as your attorney;" he answers "yes;" that is positively sworn to; nothing therefore is left to inference. That distinction reconciles all the cases.

Rule discharged, with costs.

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LEWIS v. DAVISON.

Upon a motion to set aside proceedings to outlawry, on the ground that the writ varied from the form given by the Uniformity of Process Act, it appeared that the writ was sued out by the plaintiff in person, and that the indorsement on the writ was, that it was issued by the plaintiff of *B. St.*, &c., instead of *residing* at &c., which writ was filed on the 4th of June, and might have been seen at any time afterwards by the defendant in the office:—*Held*, that it was too late in *M. T.* to take advantage of the objection if it was maintainable, though it was positively sworn that the plaintiff never knew of the outlawry till six weeks before:—*Held*, also, that it was a mere irregularity in the writ, and the objection ought to have been taken by summons at chambers.

A RULE *nisi* had been obtained by *Mansel* for setting aside the writ of *exigent* and the proclamations and other proceedings to outlawry, which had been issued against the defendant, with costs, for irregularity.

Humfrey, upon shewing cause, objected that the rule was not drawn up with any reference to the proceedings which were to be set aside, and, therefore, that no question respecting the irregularity of the writs could be gone into.

Mansel, contra.—Office copies of all the proceedings were in Court at the time the motion was made, they were handed in to the officer, and the rule ought to have been drawn up with a reference to them.

PARKE, B.—The rule is irregular. The officer says, that it ought to have been drawn up on reading the original writs, and, therefore, the rule must be enlarged for the purpose of amending the rule and re-serving it, upon paying the costs of the opposite party's appearing here by counsel.

Upon a subsequent day the objections to the different proceedings were gone into; the first was, that the indorsement upon the writ of *capias* was not in the form directed by the act 2 *Will. 4*, c. 39, s. 4. The plaintiff appeared in person; and the indorsement on the writ was thus, "This writ was issued by *Charles Lewis*, of No. 6, *Berners-*

It is no objection that the writ appears to have been returned *non est inventus* before the four months expired, it being so done by order of a Judge, which it was not necessary should be noticed on the writ.

The *exigent* is not a writ within the 12th section of the Uniformity of Process Act.

A writ directing the proclamations to be made at the parish church is sufficient, though the act says "nearest church or chapel;" it not appearing by affidavit that there was any nearer church or chapel.

street, Brunswick-square, the plaintiff within named, in person," the form given by the act being "This writ was issued in person by the plaintiff within named, who *resides* at — [stating the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such there be]." It was urged for the defendant, that the form given by the act had not been followed, and that that objection had been frequently held to be fatal; and for this were cited by *Mansel*, Price's Practice, 111, and *Smith v. Crump* (a), where Mr. Justice *J. Parke*, speaking of a similar objection, observes, that "the statute provides the form in which the summons is to be drawn; and if parties will not take the trouble of looking at the act before they proceed, they must take the consequences; if we once enter into the question as to what is material or what is immaterial in the process, we shall have innumerable questions of that sort coming before the Court. The best way is to make parties remember the course they ought to pursue, by setting aside their proceedings for not doing what they ought."

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ALDERSON, B.—They have adopted the form given where the plaintiff appears by attorney, instead of that where the appearance is in person.

PARKE, B.—The question is, whether the indorsements are not in substance the same; and whether "of" does not amount to an averment of the residence. The indorsements are on a different footing to the *capias* itself.

Lord LYNTHURST, C. B.—How are we to know that this is the plaintiff's residence? It may be his office. The act should be complied with.

(a) Ante, Vol. 1. p. 519.

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Humfrey cited the cases of *Osborn v. Gough* (a), and *Crook v. Curry* (b), and other cases, where, upon the statutes which require notice of action to be given, and that the notice shall contain the place of abode of the attorney, "of" was considered sufficiently certain and positive; but he contended that it was a mere irregularity, and that the writ having been issued several months before, it was clearly too late now to take the objection.

Mansel.—It is positively sworn by the defendant, that he had no intimation of the outlawry until about six weeks ago; at that time the writ was filed; and as no application could have been made to a Judge at chambers to set it aside, the present motion, which was made in the early part of the term, is in time.

PARKE, B.—The officer informs us, that it might have been seen with the filacer on the 4th of *June*. If this was a ground of error we would relieve on motion; but being a mere irregularity, the motion is too late.

LORD LYNTHURST, C. B.—As the defendant might have got an inspection of the writ, I think he is too late.

ALDERSON, B.—This is merely an irregularity, and therefore does not avoid the writ. An application should have been made at chambers.

Mansel.—Another objection is, that the writ, being tested on the 17th of *April*, was returned *non est inventus* before four months had expired. The writ was indorsed by the plaintiff, "to be returned *non est inventus*;" and the return of the sheriff merely was, "The within-named defendant is not found in my bailiwick." He contended, that

(a) 3 Bos. & Pull. 551.

(b) Tidd's Prac. 9th ed. p. 30, MS.

the plaintiff ought to have waited four months: and that some order of Court or other authority should have been stated, to authorize such a return.

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Humfrey.—It must have been done under a Judge's order. The practice is to go before a Judge with an affidavit that the party cannot be found, and the Judge gives leave to return *non est inventus*.

Lord LYNDHURST, C. B.—It was not necessary to refer to the Judge's order; I think there is nothing in that objection.

Mansel.—The exigent is defective in not being tested on the return of the *capias*. The 2 *Will.* 4, c. 39, s. 5 provides that every writ of exigent shall bear teste on the day of the return of the writ of *capias*; and by rule *H. T.* 4 *Will.* 4, s. 12, the officer is to mark the day and hour when it is returned. The sheriff made his return on the 17th, but it was not filed till the 18th, and therefore it was not complete till then. The exigent is tested the 17th; and the act requires every writ to be tested on the day it issues. The exigent therefore issued too soon.

Lord LYNDHURST, C. B.—The exigent is not a writ issued on the authority of that act. The writ may have issued on the 18th, tested on the 17th.

PARKE, B.—The exigent is not a writ within the meaning of the 12th section of the act.

Mansel.—The proclamations are wrong. The statute of 31 *Eliz.* c. 3, s. 1, requires one of the proclamations to be made at or near the usual door of the church or chapel of the town or parish where the defendant was living. The writ therefore ought to have followed the act, and

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directed the proclamation to be made at the nearest chapel or church. It however merely directs proclamation to be made at the parish church, it not appearing whether that is the nearest church or chapel.

LORD LYNTHURST, C. B.—In order to raise that objection, it ought to be shewn that there is a nearer church or chapel; the sheriff may know that there is no chapel in the parish.

PARKE, B.—The question is, whether it ought to have been mentioned in the writ. The act does not appear to require that it should be. The rule can only be absolute, on the terms of putting in bail and payment of costs.

Rule absolute on those terms.

PEARCE v. CHAMPNEYS.

To a declaration on a promissory note against the maker, he pleaded no consideration; the plaintiff replied that the note was indorsed to her in part payment of a debt, and that she had no notice of the premises in the plea. The defendant rejoined, that she had notice. On demurrer:—*Held*, that the plaintiff was entitled to judgment.

THIS was an action of *assumpsit* against the defendant, as maker of a promissory note for 150*l.*, payable to *Hopkins*, and by him indorsed to *Summers*, and by him indorsed to the plaintiff, with the common counts. The defendant pleaded to the first count, that there was not at any time any consideration or value for his the defendant's making the promissory note, or paying the amount thereof, or any part of it. The plaintiff replied, that the note was indorsed to her in part satisfaction and discharge of a large debt, to wit, 450*l.*, due to her from *Hopkins*; and that 380*l.* were still unpaid, and that she had no notice of the premises stated in the plea at the time of the indorsement to her. The defendant rejoined that she had notice, to which the plaintiff demurred generally, and the defendant joined in demurrer. The ground of demurrer stated in the margin was, that the plaintiff having given a

valuable consideration for the promissory note, it was immaterial whether, at the time of the indorsement to her, she had notice or not of the premises mentioned in the plea.

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Chandless, who was called on by the Court to support the rejoinder, contended, that, as the plaintiff had notice, she could be in no better condition than the payee.

PARKE, B.—Suppose it was an accommodation bill, and that notice had been given.

Chandless.—That should have been replied.

PARKE, B.—It is a principle of law, that pleadings are to be taken most strongly against the party pleading them. The judgment must be for the plaintiff.

The other Barons concurred.

Lumley was to have supported the demurrer.

Judgment for the plaintiff.

CLARKE v. JONES.

HEATON moved to set aside a *cognovit*, and to review the Master's taxation of the plaintiff's bill of costs. The plaintiff had given a *cognovit*, the condition of which was that no execution should issue unless default was made in paying 38*l.* 5*s.* 10*d.*, with interest, in three weeks; one objection was, that the *cognovit* was not stamped; another was, that there was no declaration, though it was charged for in the bill; and that there was no notice of taxation. The defendant had appeared in person.

The Court refused to grant a rule for setting aside a *cognovit* at the instance of the defendant, because it was not stamped.

No notice to tax is necessary when a defendant appears in person and gives a *cognovit*, which is good, though there is no declaration.

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PARKE, B.—The objection to the stamp would be of no avail, as they could get it stamped before cause was shewn (a). No notice to tax was necessary (b); and though it is necessary that there should be an action pending, there is no occasion for a declaration now (c). You may take a rule for reducing the costs by the amount of the charge for the declaration.

(a) See *Rose v. Tomblinson*, *Clothier v. Ess*, 3 Mo. & Scott, ante, p. 49, acc. 216.

(b) R. G. H. T. 4 W. 4, s. 17, ante, Vol. 2, p. 308; *Griffiths v. Liversedge*, ante, Vol. 2, p. 143; (c) See *Morley v. Hall*, ante, Vol. 2, p. 494.

TERNS v. FITZHUGH.

All the Judges are now Judges of the Court of Common Pleas at Lancaster, under the 4 & 5 Will. 4, c. 62.

An award is not within section 26 of that act.

KELLY applied upon the 4 & 5 Will. 4, c. 62, s. 26 (a), for a rule *nisi* to set aside a verdict which had been

(a) By which it is enacted "that it shall be lawful for any party, in any action now depending or hereafter to be depending in the said Court of Common Pleas at Lancaster, to apply by motion to any one of the superior Courts at Westminster, sitting in banco, within such period of time after the trial, as motions of the like kind shall from time to time be permitted to be made in the said superior Court, for a rule to shew cause why a new trial should not be granted, or nonsuit set aside, and a new trial had, or a verdict entered for the plaintiff or defendant, or a nonsuit entered, as the case may be, in such action; which Court is hereby authorized and empowered to grant or refuse such rule, and afterwards to proceed to hear and determine the

merits thereof, and to make such orders thereupon as the same Court shall think proper; and in case such Court shall order a new trial to be had in any such action, the party or parties obtaining such order shall deliver the same or an office copy thereof to the prothonotary of the said Court of Common Pleas at Lancaster, or his deputy, and thereupon all proceedings upon the former verdict or nonsuit shall cease, and the action shall proceed to trial at the next or some other subsequent sessions or assizes holden for the county of Lancaster, in like manner as if no trial had been had therein; or in case the Court before which any such rule shall be heard shall order the same to be discharged, the party or parties obtaining any such order may, upon delivering

entered pursuant to an award, and to enter a nonsuit. The trial had taken place in the Court of *Common Pleas* at *Lancaster*.

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PARKE, B.—The clause you refer to applies to new trials within the four days; an award does not come within the act.

ALDERSON, B.—All the Judges are now Judges of the Court of *Common Pleas* at *Lancaster*. Under the 24th clause (a) a commission issued for the purpose.

Rule refused (b).

the same or an office copy thereof to the said prothonotary, or his deputy, be at liberty to proceed in any such action as if no such rule nisi had been obtained; or if a verdict be ordered to be entered for the plaintiff or defendant, or a nonsuit be ordered to be entered, as the case may be, judgment shall be entered accordingly."

(a) This section enacts, "that it shall be lawful to and for the King's most Excellent Majesty, in right of his duchy and county palatine of Lancaster, from time to time to nominate and appoint all or any of the Judges of the superior Courts at Westminster to

be Judges of the Court of Common Pleas for the county palatine of Lancaster; provided, nevertheless, that the Judges before whom the assizes for the said county palatine of Lancaster shall from time to time be held, and their respective officers, shall alone be entitled to the fees and emoluments heretofore received by the Judges of the said county palatine and their officers."

(b) The motion was afterwards made before one Judge, and there was a new trial before two Judges (at the assizes), and the motion for a new trial was afterwards heard before them.

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BECK v. YOUNG.

An affidavit sworn before the deputy signer of the bills of *Middlesex*, before the Uniformity of Process Act came into operation, was held sufficient to warrant an arrest upon a *capias* issued after the passing of that act.

THIS was an action of trespass for an assault and false imprisonment, and came before the Court on a demurrer to the surrejoinder. The declaration stated, that the defendant, to wit, on the 27th of *November*, A. D. 1833, with force and arms, &c. assaulted the plaintiff, and seized and arrested the plaintiff under colour of a certain pretended writ of *capias* of our lord the king, before then issued out of the Court of our lord the king, before the king himself, in an action at the suit of the defendant against the now plaintiff, and then and there imprisoned and detained the plaintiff in prison, under colour of the said writ, for a long space of time, to wit, for the space of two months then next following, contrary to the laws and customs of this realm, and against the will of the plaintiff, whereby the plaintiff was then and there not only greatly hurt, but was also thereby then and there exposed and injured in his credit and circumstances, and was forced and obliged to and did pay, lay out, and expend divers monies, amounting, to wit, to 20*l.*, in and about procuring an order of the said Court for his discharge, and obtaining such discharge from the said arrest, imprisonment, and detention, to wit, in the county aforesaid. There were two other counts charging other assaults, &c. The pleas were, *first*, the general issue—Not guilty. *Secondly*, as to the assaulting, imprisoning, and detaining the said plaintiff in prison as in the first count of the said declaration is above mentioned, the said defendant, by leave &c., as far as respects the said first count, says, that before the time when &c., to wit, on &c., the said plaintiff was indebted unto the said defendant in a certain sum of money, to wit, the sum of 25*l.* 13*s.* 8*d.* for goods sold and delivered by the defendant to the plaintiff, and the plaintiff then and there undertook and promised the defendant to pay to him the said sum of money

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whenever afterwards he should be thereunto requested; but the said sum being wholly unpaid to the said defendant, and the said undertaking and promise wholly unperformed, he the said defendant, for the recovery of his damages by him sustained on occasion of the not performing of the said promise and undertaking of the said plaintiff, afterwards, to wit, on the day and year aforesaid, in the county aforesaid, sued and prosecuted out of the Court of our lord the king, before the king himself, (the said Court then and still being holden at *Westminster*, in the county aforesaid), against the said plaintiff, a certain writ of our said lord the king, by which said writ our said lord the king commanded the sheriff of *Middlesex* that he should not omit by reason &c., which said writ afterwards, and before the delivery thereof to the said sheriff of *Middlesex*, to be executed as hereinafter mentioned, was duly marked and indorsed for bail for 25*l.* 13*s.* 8*d.*, according to the form of the statute in such case made and provided, and afterwards, at the said time when &c., and whilst the said writ was in full force, to wit, on &c., in the county aforesaid, the said plaintiff being then in the custody of the said sheriff of *Middlesex*, at the suit of some other person or persons, the said writ so indorsed was delivered to the said sheriff of *Middlesex* by way of detainer against the said plaintiff, and in due form of law to be executed, and the said sheriff thereupon detained the said plaintiff for the cause aforesaid as he lawfully might, which is the supposed trespass in the introductory part of this plea mentioned, and whereof the said plaintiff hath in his said first count above complained against him the said defendant; and this he the said defendant is ready to verify, wherefore &c.

The replication alleged, that, at the time the said sheriff detained the plaintiff for the cause aforesaid, as in the said plea alleged, there was no affidavit of the defendant's cause of the said action in that plea alleged made before

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alleges that no affidavit was made, whilst the surrejoinder admits that there was an affidavit, but that it was made in 1832. The rule laid down in *Comyn's Digest* (a) is, that if the replication, &c. does not maintain the declaration, &c., it is a departure; as, in the common case of an action on a bond to perform an award, to which the defendant pleads that no award was made, and the plaintiff replies by setting out an award, and shewing a breach, if the defendant rejoins that the award is bad, it is a departure (b). Tho cases there cited are precisely analogous.

PARKE, B., referred to *Fisher v. Pimbley* (c), and *Dudlow v. Watchorn* (d).

Archbold.—Those cases are perfectly distinguishable. In *Praed v. Duchess of Cumberland* (e), where, to debt on an annuity bond, the defendant pleaded that there was no such memorial as the statute required; to which the plaintiff replied that there was a memorial which contained the names of the parties, &c., and the consideration for which the annuity was granted; and the defendant rejoined that the consideration was untruly alleged in the memorial to have been paid to both obligors, for that one of them did not receive any part of it, the rejoinder was held bad, and one of the grounds was, that it was a departure from the plea. Here the plaintiff, in his replication, says, that there was no affidavit made before the officer who issued the writ, or his deputy; in the surrejoinder, he admits that there was an affidavit made before the officer who issued the writ, but denies that that officer had any power or authority to issue the writ; there is therefore clearly a departure within the principle of the case of *Praed v. Du-*

(a) Tit. Pleader, (F. 7), citing
T. Rayn. 94; 2 Ro. Abr. 692,
l. 40; 1 Lev. 300; 1 Wils. 122;
1 Sid. 180.

(b) Id. *ibid*.

(c) 11 East, 188.

(d) 16 East, 39.

(e) 4 T. R. 585; 2 H. Bla.
280, S. C. in error.

chess of Cumberland, which was confirmed in error, and is a case of great authority. The plea should have been that there was no affidavit except &c., shewing how the affidavit was void.

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Chandless was called upon by the Court to answer this objection. The question is, whether the surrejoinder shews that there was no *legal* affidavit made; and that depends upon the question, which is the principal one in the case, whether an affidavit of debt, sworn before the deputy signer of the bills of *Middlesex*, before the act of 2 Will. 4, c. 39, was in force, warranted the issuing of a writ of *capias* after that act came into operation. It was expressly decided in *Beck v. Young* (a) that it did not. The rule is, that every thing in a surrejoinder that maintains and fortifies the replication is not a departure from it. The replication states, in effect, that there was no affidavit which legally warranted the issuing of the writ. The surrejoinder shews the circumstances under which the affidavit set out in the rejoinder was made; and which, according to *Beck v. Young*, support the replication, by shewing that the affidavit upon which the defendant relies is not in point of law an affidavit which would support the writ; and it is the same in point of law as if there had been no affidavit at all. The case of *Praed v. The Duchess of Cumberland* very much proceeded upon the ground of the old cases respecting awards, which are found in *Comyn's Digest*, and many of which may be considered as overruled by *Dudlow v. Watchorn*.

PARKE, B.—The marginal note to *Praed v. Duchess of Cumberland*, in 2 *Henry Blackstone*, is clearly incorrect, and has no application to the case; the ground on which the judgment proceeded there was, that the rejoinder

(a) Ante, Vol. 2, p. 462.

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introduced a fact which merely affected the deed granting the annuity, and did not touch the memorial of the deed.

Chandless.—*Dudlow v. Watchorn* is very similar to the present case; there the bail, who were sued in *scire facias* upon their recognizance, pleaded that no *ca. sa.* was duly sued out returned and filed against the principal according to the custom and practice of the Court; to which the plaintiff in reply shewed a writ of *ca. sa.* issued into *Middlesex*; and it was held to be no departure for the defendants to rejoin that the venue in the action against the principal was in *London*, for that sustained the plea. So, in *Fisher v. Pimbley*, to debt on bond, which was conditioned to perform an award, and a plea of no award, the replication stated an award; then the rejoinder set out the whole award, (in which were recited the bonds of submission, whereby it appeared that the award was not warranted by the submission), and concluded by demurring; it was held, that the rejoinder was not inconsistent with nor a departure from the plea. Here the replication and surrejoinder both shew that there was no legal affidavit. A thing not done according to law is a nullity. The surrejoinder, therefore, supports and explains the replication, and is therefore no departure.

PARKE, B.—The question is, whether you ought not in your replication to have shewn the facts on which you rely. You say in your replication that there was no affidavit before the officer who actually issued the writ; the surrejoinder admits that it was made before the officer who issued the writ, but your point is, that the officer had no power then. You say that “lawfully” is imported into the replication.

Archbold.—As to the principal point, whether the affidavit is sufficient to support the writ, it is necessary for

the plaintiff to shew, not only that the writ was irregular, but that it was actually void. The decision in the Bail Court may be supported on the former ground; but whether that decision is correct or not, it cannot be contended that the writ is void. The question depends on the 12 *Geo.* 1, c. 29, the first section of which prohibits an arrest for a sum less than 10*l.*; the second section allows an arrest for 10*l.* upon an affidavit being made; but as to the mode in which the affidavit is to be made, that section is merely directory. If that section is peremptory, and not directory merely, a party could not be held to bail on a foreign affidavit, neither would an arrest under a Judge's order be within the act.

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PARKE, B.—The statute was not intended to interfere with the act of the Court, but only with the plaintiff's own act.

ALDERSON, B.—Do not the cases go on the ground, that, if the affidavit is such that you can assign perjury upon it, it is sufficient? How does it appear that perjury could be assigned upon this affidavit?

Archbold.—The affidavit was made before the officer who issued the first writ, and that is sufficient; for, in *Richards v. Stewart* (a), it was held to be sufficient to warrant a new writ in a new action.

ALDERSON, B.—*Tindal*, C. J., in giving judgment in that case, says (b), “ If the plaintiff has availed himself of that affidavit to found upon it his right to hold to bail in the second action, he would be estopped from denying that it was an affidavit made in that cause; and although it may be said that the affidavit might have been true at the time

(a) 3 M. & Scott, 774.

(b) *Id.* p. 785.

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it was made, but not so at the time of issuing the second writ, the same objection might arise in every case where there is an interval of time between the making of the affidavit and the issuing of the writ. In *Boyd v. Durand*, it was held that if a plaintiff proceed by a second original *capias*, instead of a *testatum capias*, a second affidavit to hold to bail is not requisite."

Archbold.—It is precisely so here. But the new writ is a good continuance of an old writ; it is the same in substance, and it differs in form only.

PARKE, B.—It has been held over and over again that the new act applies only to actions commenced upon it. The act does not prevent the officer from issuing the same process as before the act was necessary to continue an action. The question here is, whether the affidavit should not have been sworn before an officer who had the same power after the act. A commissioner for taking affidavits would have had that power.

Archbold.—No precise form of writ was given by law previously to the act, and therefore if a writ had issued in the form of that given by the new act, it would not have been a nullity, even if it had been irregular; and it does not precisely appear when the writ issued, for the day in the surrejoinder is laid under a *scilicet*.

Chandless, contra.—It appears by the record that it is a *capias* under the new act, for it follows the form given by the act; and it must be taken to have issued at the time alleged, though under a *scilicet*. The Court is bound to take notice of the forms of writs. The affidavit did not warrant the writ. In the second section of the 12 *Geo.* 1, c. 29, there are prohibitory words; and they have been construed in a variety of cases to mean that the affidavit

must be sworn before the officer who issued the writ. *Dalton v. Barnes* (a), *Dorville v. Wombwell* (b), *Anderson v. Hayman* (c), *Martin v. Bidgood* (d), *Boyd v. Durand* (e), *Baker v. Allen* (f). Can it be said that the officer who issued the process was the same officer before whom the affidavit was sworn? The decision in *Beck v. Young* proceeded on the ground that he was not. It is not because the same individual fills the situation that he can be said to be the same officer. The duties of the office constitute the officer. In *Rodwell v. Chapman* (g), where a second original writ of *capias* was issued on the same affidavit, and the Court held it good, the same officer still continued in full exercise of his power at the time the second writ issued; here the officer, who took the affidavit, had ceased to exist at the time of the issuing of the second writ.

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The judgment of the Court was now delivered by *Parke, B.*, who, after stating the pleadings, proceeded thus:—Several questions were raised in this case; but, as we are in favour of the defendant on the principal point, it has become unnecessary to advert to the others. The plaintiff objected, that the affidavit of debt, being sworn before the deputy signer of the bills of *Middlesex* before the Uniformity of Process Act came into operation, did not support a *capias* sued out after the passing of that act, on the ground that the officer, before whom the affidavit was sworn, had not at that time power to issue such a writ as afterwards did issue; and, in support of this position, the case of *Beck v. Young*, in the second volume of *Dowling's Practical Cases*, which

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| (a) 1 M. & Selw. 230. | 60, S. C. |
| (b) 10 B. Moore, 318; 3 Bing. | (c) 2 Taunt. 161. |
| 39, S. C. | (f) 1 M. & R. 232; 7 B. & C. |
| (c) 2 B. Moore, 192. | 526, S. C. |
| (d) 12 B. Moore, 236; 4 Bing. | (g) 1 Cr. & M. 70. |

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was heard before me in the *King's Bench Bail Court*, was relied on. I certainly did so decide in that case, and ordered a discharge, under the idea that it was a new process, and that the deputy signer of the bills of *Middlesex* had no power to issue such a process. I am now of opinion that my judgment in that case was wrong, and the rest of the Court are also of that opinion. It does not appear that the *capias* directed by the act to be now used is a new process. It is a writ directed to the sheriff as before, commanding him to take the defendant, and safely keep him until he gives bail or makes a deposit; and though returnable differently, yet in substance it is the same as the writs previously in use. Suppose, before the act, a rule of Court had ordered that the name of the nominal defendant should not be inserted, that would not have altered the nature of the writ, and the same officer might have issued it; it makes no difference that a statute has ordered the alteration. The same officer would continue to act as a matter of course; and therefore we are of opinion, that the affidavit sworn before the deputy signer of the bills of *Middlesex* was sufficient, and that judgment must be for the defendant.

Judgment for the defendant.

END OF MICHAELMAS TERM.

KING'S BENCH PRACTICE COURT.

Hilary Term,

IN THE FIFTH YEAR OF THE REIGN OF WILL. IV.

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MANSEL moved for a rule to shew cause why the writ of *sci. fa.* against bail in this case should not be set aside, on three different grounds. The first ground was, that, although the original action had been commenced by a writ of summons, the writ of *sci. fa.* recited it as commenced "by bill, without our writ." This, it was contended, was irregular, since proceedings by bill had been abolished by the Uniformity of Process Act (2 Will. 4, c. 39). The allegation should have been "by our writ." He cited *Darling v. Gurney and Another* (a), where the Court held, in a similar case to the present, that, as the process by bill was abolished by the Uniformity of Process Act, it is demurrable to allege that the plaintiff commenced his suit by bill. The second objection was, that it was alleged that bail had been put in of a term before the action had been commenced. This it was submitted amounted to an irregularity; for it thus appeared on the face of the proceeding that bail had been put in to an action which had not been commenced. The third objection was, that the writ was tested on the 3rd November, and made return-

Since the Uniformity of Process Act, it is irregular for a *sci. fa.* to recite the action as commenced "by bill, without our writ," if it has been commenced by summons.

It is irregular in a *sci. fa.* to state the bail to have been put in on a day previous to the issuing of the writ.

It is an immaterial objection to a *sci. fa.* that it is tested on the 3rd November, and returnable on the 15th November "next coming."

A *ca. sa.* is irregular, if it is tested before the time of signing judgment.

(a) Ante, Vol. 2, p. 101.

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able on the 15th *November* "next coming." The clear meaning of those words was, that the writ was not returnable in *November*, 1834, but in *November*, 1835. This was an irregularity; for, in mesne process, a term ought not to be allowed to intervene between the teste and return. These objections, though strict, being for the relief of bail, the Court would be disposed to give greater indulgence to them in this than in ordinary cases.

A rule *nisi* having been obtained on these grounds—

Wilson shewed cause, and contended that these objections could only be available as matter of plea.

LITLEDALE, J., was of opinion, that the writ was irregular on the two first grounds, but thought that the third objection could not be sustained. His Lordship, however, suggested that some arrangement should be made between the parties, and for that purpose the case was directed to stand over.

A rule *nisi* was then obtained to set aside the *ca. sa.* against the principal, on the ground of its having been tested before the time when the judgment was signed. The judgment had been signed on the 18th of *June*, but the *ca. sa.* was tested on the 12th of *June*, the last day of *Trinity* Term. From this it would appear that a writ of execution had been issued before judgment was signed. He cited *Gawler v. Jolly* (a), where the Court held that it would set aside proceedings against bail if the *ca. sa.* be tested of a term prior to that in which judgment is signed against the principal. This decision, it was true, had been pronounced before the 3 & 4 *Will.* 4, c. 67, s. 2; but that statute would not cure the defect.

By 3 *Reg. Gen. H. T.* 4 *W.* 4 (b), it was ordered, that "all judgments, whether interlocutory or final, shall be

(a) 1 H. Black. 74.

(b) Ante, Vol. 2, p. 313.

entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day." The judgment, therefore, could only have relation to the 18th of *June*. On the face then of the proceedings it would appear that execution had been issued before judgment was signed. Now the words of the 3 & 4 Will. 4, c. 67, s. 2, were these: "All writs of execution *may* be tested on the day on which the same are issued, and be made returnable immediately after the execution thereof." According to that act, writs of execution might be tested in vacation, and that was the sole effect which was produced by it as to the teste of writs of execution; but that act did not authorize a plaintiff so to teste his writ of execution as to make it appear to have been issued on a day previous to judgment being signed. It had been decided, it was true, in *Brocher v. Pond* (a), that a *fi. fa.*, or a judgment signed after a defendant's death in vacation, may be tested on the last day of the preceding term, notwithstanding the 3 & 4 Will. 4, c. 67, s. 2. This case, however, only shewed that the plaintiff had still a right to avail himself of the doctrine of relation, instead of issuing his execution on a writ tested in vacation. But that case did not decide that a plaintiff would be at liberty to avail himself of that doctrine in such a way as to make it appear that the Court had issued a writ of execution when there was no judgment to authorize such a proceeding. A rule *nisi* having been obtained on this ground—

Wilson shewed cause, and contended that, according to the act of the 3 & 4 Will. 4, c. 67, s. 2, and the construction put on it by the Court in the case of *Brocher v. Pond*, it was optional with the plaintiff whether he would teste his writ of execution according to the old form, or of the day on which it issued according to the statute.

(a) Ante, Vol. 2, p. 472.

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LITLEDALE, J.—The writ is clearly irregular. It ought not to have been tested before the time to which the judgment had relation. The present rule, therefore, must be made absolute (a).

It was then agreed between the parties that both rules should be made absolute, without costs.

Rules accordingly.

(a) See *Rea v. The Sheriff of Surrey*, ante, p. 82. It is to be observed, that, in 3 *Reg. Gen. H. T. 4 Will. 4*, (ante, Vol. 2, p. 313), there is a proviso "that it shall be competent for the Court or a Judge to order a judgment to be entered *nunc pro tunc*." But no authority is given to teste a writ of execution *nunc pro tunc*. According to the provisions of the 3 & 4 *Will. 4*, c. 67, s. 2, the writs may be tested either on the day on which they are issued, or of the term previous to the vacation in which judgment is signed, but at no intermediate time. A difficulty therefore may occasionally arise in cases where a party has

died after judgment and before execution. If the writ of execution bears teste on a day after the defendant's death, it would be irregular; and if it bears teste of the term previous to signing judgment, it would be irregular, because it will then appear to have been issued before judgment was signed. The course which ought to be pursued, it is conceived, will be in such a case to apply to enter a judgment *nunc pro tunc* of a day in the term preceding the defendant's death, and then to teste the writ of execution on the last day of that term, according to the old principle of relation.

SANDALL v. BENNETT.

(Before the four Judges.)

The fact of the plaintiff's cause of action not exceeding 40s. and the defend-

THIS was an action for work and labour done as an undertaker. The defendant pleaded, that the plaintiff's cause being resident within the county of *Middlesex*, and liable to be summoned to the County Court, cannot be pleaded in answer to the plaintiff's declaration.

of action, if any, amounted to a less sum than 40*s.*, and that the defendant, at the time of the action being brought, lived and resided in the county of *Middlesex*, and was liable to be summoned to the County Court of the said county, according to the form of the statutes in such case made and provided. To this plea the plaintiff demurred.

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Mansel, in support of the plea.—The 6 *Ed.* 1, c. 8, (the statute of *Gloucester*), provided, “ that sheriffs shall plead pleas of trespass in their counties as they have been accustomed to be pleaded; and that none from henceforth shall have writs of trespass before justices, unless he swear by his faith that the goods taken away were worth 40*s.* at the least.” That provision shewed, that, where the cause of action amounted to a less sum than 40*s.*, the action could not be brought in the superior Courts. Lord *Kenyon*, C. J., so held in *Hammond v. Jones* (a); for he says, “ This is a very general question, which concerns the practice of the Court, whether it shall be permitted by parties to sue in the superior Courts for such small sums as those under 40*s.*, now that is expressly prohibited by act of Parliament.” On this statute it was remarked by Sir *Edward Coke*: “ Note—*Briefes de trespass devant justices*: writs of trespass are here put but for an example, for debt, detinue, covenant, and the like. *Vailent 40*s.* al meyns*: for, as the inferior Courts, which are not of record, regularly cannot hold pleas of debt, or damages, but under 40*s.*; so the superior Courts that are of record cannot hold plea of debt or damages regularly, unless the sum amount to 40*s.* or above (b).” “ The maxim of the common law is, *Quod placita de catallis, debitis, &c., quæ summam 40*s.* attingunt, vel eam excedunt, secundum legem et consuetudinem Angliæ sine brevi Regis placitari non debent*. The said words, *Vailent 40*s.* al meins*, have re-

(a) 4 T. R. 495.

(b) 2 Inst. 311.

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ceived this construction, that the same must so appear to be of value in the plaintiff's count; for it is not sufficient that it appears by verdict that the sum is under 40s. For example, if the plaintiff's count is in trespass, debt, detinue, covenant, &c., to the damage of 40s., and the jury find the damages under 40s., yet the plaintiff shall have no judgment, albeit, in truth, the cause *de jure* belonged to the inferior Courts (a)." The *Middlesex* County Court Act, the 23 Geo. 2, c. 33 (b), which gave double costs to the defendant in any case of an action of debt or *assumpsit*, where the defendant resided at the time of bringing the action in the county, and was liable to be summoned to the County Court, and the jury assessed the damages under 40s., must be cumulative on the statute of *Gloucester*. It could not be considered as repealing it, or as in any way a substitution for the previous acts. The cause of action here amounting only to 40s., and the defendant being liable to be summoned to the County Court of *Middlesex*, the plaintiff had no right to bring his action in the superior Court. The plea stating those facts must therefore be considered good in point of law.

Steer, in support of the demurrer, contended, that, although the statute of *Gloucester* required that parties should not bring their action in the superior Courts, where the plaintiff's claim amounted to no more than 40s., it did not also entitle a defendant to plead that fact in answer to an action for a sum, which, as he alleged, did not exceed 40s. But, at any rate, the *Middlesex* County Court Act must be considered as repealing the statute of *Gloucester*, and giving a new remedy to the defendant in case of the action being brought for a less sum than 40s. That remedy the defendant was bound to pursue, and not adopt the present, of pleading the fact.

Lord DENMAN, C. J.—It would have been unnecessary

(a) 2 Inst. 312.

(b) S. 4—19.

to have passed the *Middlesex* County Court Act if the statute of *Gloucester* had still been in force. But if it were, it must be considered as repealed by the later act.

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Steer.—The provision in sect. 19, that, “unless the Judge shall in open Court certify on the back of the record, that the freehold or title to the plaintiff’s land principally came in question, or that an act of bankruptcy principally came in question at such trial, then and in such case no costs shall be awarded, &c.,” shewed that the legislature had in view the statute of *Gloucester* when the two exceptions were introduced. It was true, that, in *Kennard v. Jones (a)*, the Court stayed proceedings before trial, on the ground that the cause of action was under 40*s*.

TAUNTON, J.—But that was a very different thing from pleading in bar.

Steer was then stopped by the Court.

LORD DENMAN, C. J.—In the case of *Low v. Low (b)*, the Court of *Common Pleas* refused, in an action of trover, to stay proceedings on an affidavit by the defendant that the cause of action did not amount to 40*s*. It appears to me to follow as a consequence of the provisions contained in sect. 19, with respect to the penalty of costs where the cause of action does not amount to 40*s*., that an action may be brought for such a sum in the superior Courts. The plaintiff could not be liable to costs under this section unless he had brought his action in the superior Court. The action being so brought, the penalty is provided by this section, and the defendant should avail himself of the remedy thus given to him. No authority, and no precedent has been cited or produced, in order to shew that

(a) See *Gill v. Lougher*, 1 C. & J. 170, *supra*.

(b) 8 B. Moore, 220; 1 Bing. 270.

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the fact of the amount of the cause of action can be made the subject of a plea.

TAUNTON, J.—This plea is defective in point of law, if even the fact of the cause of action being under 40*s.* could be pleaded. By the section in question, it is provided, that, in certain excepted cases, the action may be brought in the superior Courts, even though the sum recovered is under 40*s.* The plea, therefore, should have gone on to allege that the cause of action in the present case was not one of the excepted instances. But it appears to me that the proper course for the defendant to adopt is, to make an application to enter a suggestion to deprive the plaintiff of his costs, and obtain double costs for himself. I know of no precedent for such a plea as the present, and I am not disposed to encourage any such experiment.

PATTESON, J., and WILLIAMS, J., concurred.

Judgment for the plaintiff.

REX v. The Justices of GLOUCESTERSHIRE.

If a regular notice of appeal has been given for one Sessions, and the appeal be adjourned at the instance of the appellants, after hearing counsel on both sides, it is not necessary to give a strictly regular notice of trial for the following Sessions.

JUSTICE shewed cause against a rule *nisi* obtained by Greaves for a *mandamus*, to be directed to the Justices of Gloucestershire, commanding them to enter continuances, and hear an appeal against an order for the removal of a pauper. The facts disclosed in the affidavits on both sides were in substance as follows:—The order of removal was made in *March*, 1834, and regular notice of appeal was given for the *Easter* Sessions. At those Sessions, upon the application of the appellants, the appeal was adjourned upon an affidavit of the illness of a material wit-

ness for the appellants, after the Court had heard counsel on both sides, the appellants paying the costs of the day. A second notice of appeal was given for the *July Sessions*, which was too late by two days, if the rules of the Sessions applied to this case. Those rules required notice on all trials of appeal to be given on or before the *Thursday* in the week next before the Sessions, and the like notice in the case of respited appeals. Another rule required the appellants to produce the pauper on the trial of the appeal, or the order would be confirmed. Within a few days of the *July Sessions* the pauper was confined, and thereby rendered incapable of being produced at those Sessions; in consequence of which the appellants, on an affidavit of these facts, moved to adjourn the appeal again; when it was objected that the appellants could not be heard—first, on the ground that the notice was too short; and, secondly, on the ground that the pauper was not produced. The Sessions refused to adjourn the appeal, and confirmed the order. The rule, he contended, ought to be discharged. The Justices at Sessions were entitled to make rules for the regulation of their practice, if they were not unreasonable; and the Courts had always declined to interfere with their discretion in such cases. There was nothing unreasonable in the present rule; and the Justices having acted in conformity with it, there was no ground for the present application. He cited *Rex v. The Justices of Wilts* (a), *Rex v. Lindsey* (b), *Rex v. The Justices of Monmouthshire* (c). He also referred to 2 *Nol. P. L.*, p. 534, where this passage was to be found—“Where there was a *mandamus* to the Sessions to proceed on an appeal, they (*i. e.* the justices) returned, that the appeal was dismissed for want of six days’ notice, which by a former order they had appointed to be given of every appeal. The

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(a) 2 M. & R. 401; 8 B. & C.
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(b) 6 M. & Sel. 679.
(c) 1 B. & Ad. 895.

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Court allowed the return; for they are the properest judges of a point of practice at the Sessions, and all Courts must have stated rules to go by." Under these circumstances the present rule ought to be discharged.

Greaves, in support of the rule.—Unless this rule be made absolute, the result will be, that the greatest injustice will be inflicted on the appellants, who are innocent parties; and not only have been guilty of no default, but have done their utmost to comply with the strict rules of the Sessions. At the *Summer* Sessions they stood in this position:—By the invariable practice of the Sessions, they were bound to produce the pauper on the trial of the appeal; but that was impossible in consequence of her recent confinement and total inability to be then conveyed to *Gloucester*. As the order would be confirmed as a matter of course on the non-production of the pauper, the only course they could adopt was that of applying, as they did, for an adjournment of the appeal, in order that the pauper might be produced at the next Sessions. This, however, the Sessions refused; and, unless the present rule be made absolute, the appellants will be for ever concluded by the accidental circumstance of the pauper's confinement, over which they had no control, and by which it is most unreasonable that they should be injured. If it were necessary to enter into the question, whether the practice is a legal practice or not, strong reasons might be assigned for doubting its legality. Many cases might be put, of which the present furnishes an example, where it is absolutely impossible for the practice to be put into execution. Now, it is too much to say that the Sessions have jurisdiction to make rules, which shall bind innocent parties absolutely in cases where they are absolutely incapable of complying with them. But supposing it possible that they might have power to make such a rule, it cannot at all events have any greater effect than an act of Parliament. Now, it has

been held in *Rex v. Essex* (a), and *Rex v. Southampton* (b); that, where an order of removal is served so short a time before the Sessions that it is impossible to try the appeal at the next actual Sessions, it is not necessary even to enter and respite the appeal at such Sessions, as that would only be productive of unnecessary expense; and this Court will compel the Justices to receive the appeal at the second Sessions after the order was made. Now, by parity of reason, the Court will compel the adjournment in this case; and the more so, because this was an absolute impossibility. In those cases there might have been an entry and respite; and the ground on which the Court there acted was merely that the Justices required what was unreasonable, not what was impossible. *Secondly*, as the notice was objected to, the Sessions had no discretion, but were bound to adjourn this appeal under 9 Geo. 1, c. 7, s. 8. That statute extends to all cases, in which an objection is taken to the notice of appeal, at whatever Sessions such appeal may come on to be tried, provided such appeal has not been previously adjourned at a former Sessions under the same statute. It is true the appeal can only be adjourned once by virtue of the statute, because in that case it requires the justices finally to hear and determine it at the next Sessions after such adjournment. Three cases have been decided on this clause. In *Rex v. North Riding of Yorkshire* (c), the first case which occurred, the Court held that the statute did not deprive the justices of a discretionary power. But that case was expressly overruled by *Rex v. The Justices of Buckinghamshire* (d), which latter case was brought under the consideration of, and fully confirmed by, the Court in *Rex v. Staffordshire* (e). Now, these two cases have es-

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(a) 1 B. & Ald. 210.

(b) 6 M. & S. 394.

(c) 3 T. R. 150.

(d) 3 East, 342.

(e) 7 East, 549.

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tablished that the words of the statute are compulsory, and that the justices are bound to adjourn the appeal. It is true, that in those cases the refusal to adjourn was at the first Sessions after the order was made; but that does not limit the operation of the statute to those Sessions. These cases are affirmative, that the justices must adjourn, as far as the facts of them would warrant, and no case has ever decided that the statute is to be limited in its construction. On the contrary, it is contended that the statute is compulsory at a second as well as at a first Sessions. The preamble embraces the mischief of a second as well as a first Sessions, and its terms are as large as possible; then the enacting part is as general and comprehensive as words can make it; and the question is not so much whether the words embrace such a case as the present, as whether there be any thing to confine their operation. It is not unimportant also to consider the effect of a decision limiting the operation of this clause to the first Sessions; if the part as to adjournment only applies to the first Sessions so must the preceding part as to notice (*a*); and this absurdity will result, that this, the only statute requiring notice in such cases, does not require a notice at the second Sessions; and then assuming that that is so, the only ground taken on the other side entirely fails. But it is well known that as many appeals are entered and respited, and tried at a second Sessions, as are tried at the Sessions at which they are first entered. To hold the statute, therefore, to apply to the first Session only, would render it inoperative in about half the cases which are tried. Besides, the next section is connected with this section by the word "and;" if therefore the one is to be confined to the first Sessions, so must the other, and no costs of maintenance can be given at any but the first Sessions; and as the 8 & 9 *Will.* 3, c. 30, s. 3, is therein referred to,

(*a*) *Rex v. Gloucestershire*, Dougl. 191.

the same observation applies to that section, and the Sessions have no power to give the costs of appeals at a second Sessions. Now, the uniform practice having been to give costs in both these cases at whatever Sessions the appeal was determined, that affords a strong argument that there is no limitation to the first Sessions. Moreover, s. 8, of 9 *Geo.* 1, is remedial; and therefore, according to the well-known rule, must be construed so as to embrace all the cases which fall within the mischief against which it was the intention of the legislature to provide. Now it is impossible to say that "disputes and controversies concerning the time of notice" are prevented "as much as may be," if the clause be limited to the first Sessions. *Thirdly*, the case of *Rex v. Lindsey* (a), cited on the other side, is an authority in favour of this application. The only difference between it and the present case is, that there, the respondents moved for the adjournment, here the appellants did so; but the reason assigned by Lord *Ellenborough* is equally applicable to this case; for how can it be said here, that the respondents were ignorant of the intention of the appellants to try, when they were present and opposed the adjournment, and were paid the costs of the day? The statute only requires *one* sufficient notice; here, that was given before the *Easter* Sessions. The application to adjourn indicated a determination to persevere in the appeal, and of that, the respondents were aware; they, therefore, had no right to object to the want of notice. *Fourthly*, the rule of the Sessions as to the notice of adjourned appeals only applies to those cases, where the appeal has been entered and respited as a matter of course, and no notice has been given before the Sessions at which the appeal has been entered. That rule was made for the common and ordinary cases, and not for an appeal under such peculiar circumstances as the present. In *Rex v. Lindsey*, rules as nearly similar as

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possible were held not to apply to a case like the present. *Fifthly*, even supposing the Court should be against this rule on the previous points, still it is clearly established by *Rex v. Wilts (a)*, and *Rex v. Lancashire (b)*, that, wherever the justice of the case requires it, this Court will exercise a visitatorial authority over the Sessions, and compel them to hear an appeal where they have refused to do so against the real merits of the case. No words can be more appropriate to the present case than those used by Lord *Ellenborough* and Lord *Tenterden* in those cases; for here the appellants were guilty of no laches, but were endeavouring to obey an arbitrary and inflexible rule of the Sessions, being placed in the situation in which they were by an event over which they had no control. The appellants swear to merits; the respondents do not even swear that they had reasonable grounds for the removal; it is obvious, therefore, that the objection was merely to prevent the merits from being heard, and that the Sessions have not exercised their discretion in that way which is conducive to the essential administration of justice, and the Court ought therefore to compel them to hear the merits of the appeal. With regard to *Rex v. Wilts (c)*, the facts of that case are so entirely different from this case, that it is no authority one way or the other; if either, it is in favour of the rule. Lord *Tenterden* says, "It is impossible to say that the matter must at all events be determined at the first Sessions; the statute expressly mentions one case where the Justices are to adjourn the appeal, and that is where it shall appear to them that reasonable notice has not been given; but other cases may occur, in which it may be fit to adjourn the appeal even though reasonable notice has been given, as in the case of the unavoidable absence of a material witness." Here a material witness,

(a) 10 East, 404.

(c) 2 M. & R. 401; 8 B. & C.

(b) 2 M. & R. 519; 7 B. & C. 380.

not for the appellants, but for the respondents, was absent unavoidably; and the sole object of asking for the adjournment was, to comply with the practice of the Sessions by producing that witness. This, therefore, is a much stronger case than that put by Lord *Tenterden*. In *Rex v. Justices of Monmouthshire*, the facts were these:—A valid notice of appeal having been duly served, the respondents appeared at the Sessions prepared to try; the appellants moved to adjourn the appeal on the ground of the absence of a material witness, which I, as counsel for the respondents, opposed, unless the appellants would pay the costs of the day, which the Sessions thought was nothing more than reasonable; but this the appellants refused to do, whereon the application was refused. On shewing cause against the rule for a *mandamus*, the ground on which the Attorney-General (Sir *J. Campbell*) and myself principally relied was, that, as there was a sufficient notice given before the Sessions, the case was not within the 9 *Geo.* 1, c. 7, s. 8, and therefore the justices had a discretion to exercise, and the Court being of this opinion discharged the rule.

As to the passage cited from 2 *Nol.* 534:—*First*, the case on which it rests was decided before the 9 *Geo.* 1 passed, and is therefore no authority now. *Secondly*, the point in question is assumed; for it is asserted that the statute left the magistrates with the same jurisdiction as they had before it passed, which is at all events contrary to *Rex v. Bucks*, and *Rex v. Staffordshire*, as to the first Sessions. *Lastly*, it does not appear by the report at what Sessions the case in *Strange* occurred; if at the first, after the removal, as is probable, it is overruled by the two last-mentioned cases.

Cur. adv. vult.

LITLEDAL, J., afterwards sent an intimation to the *Crown Office*, that he was of opinion that the rule for the

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mandamus ought to be made absolute, but giving no other reason than "I thought the notice sufficient."

Rule absolute.

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The 9 Geo. 1, c. 7, s. 8, only applies to the first Sessions after executing the order of removal, and therefore the Court will not interfere with the discretion of the magistrates at the second, as to adjournment, if it is in furtherance of a reasonable practice.

TALBOT had obtained a rule, calling upon the justices of *Monmouthshire* to shew cause why a *mandamus* should not issue commanding them to enter continuances and hear an appeal. By an order of removal, dated *May 28, 1834*, a pauper was removed from the parish of *Bedwellty*, in the county of *Monmouth*, to the hamlet of *Rhyndwyslydach Lower*, in the county of *Glamorgan*. At the following Sessions, which were held at *Usk*, on the 30th of *June*, an appeal against the said order was entered and respited in the usual manner by Messrs. *M'Donnel & Mostyn* of *Usk*, who acted as agents for Mr. *Jenkins*, the attorney for the appellants, and who had received a letter from him directing them so to enter and respite the appeal. No notice was given to the respondents previous to such entry and respite; but, on the 30th of *September* following, Messrs. *M'Donnel & Mostyn* received a letter inclosing a notice of appeal from Mr. *Jenkins*, which notice was forwarded by them by the same day's post to Mr. *T. J. Phillips*, the attorney for the respondents. By the practice of the *Monmouthshire* Sessions, eight days' notice is required in common appeals, and fourteen days' notice in respited appeals. The *Michaelmas* Sessions was held at *Usk* on the 14th of *October*; it was therefore admitted, that the notice of appeal was served too late; in consequence of which, notice was given by the appellants to the respondents, that they should move to adjourn the appeal at the ensuing Sessions. Accordingly, at those Sessions, the appellants did so move, when, the Court, exclusive of the

chairman, being equally divided in opinion, he gave the casting vote against the appeal being adjourned. Mr. *Jenkins* stated in his affidavit that he was wholly ignorant of the practice of the *Monmouthshire* Sessions, never having tried an appeal at them, and that he never heard that fourteen days' notice of appeal, in case of adjourned appeals, was necessary, until he was so informed by a letter, dated the 30th of *September*, from Messrs. *M'Donnel & Mostyn*. The affidavit against the rule stated, that Messrs. *M'Donnel & Mostyn* had been in practice for many years at *Usk*, where the Sessions were always held, and were well acquainted with the practice of those Sessions.

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Greaves now shewed cause.—If this case falls within the 9 *Geo.* 1, c. 7, s. 8, it must be conceded, that the justices were bound to permit the appeal to be adjourned, and, having refused to do so, this *mandamus* must go. But this case is not within that statute, for two reasons: *first*, because this appeal has been once adjourned under that statute, and therefore could not be again adjourned under it; and, *secondly*, because that statute only applies to the Sessions next after the order is made. *First*, the adjournment at the *Summer* Sessions was by virtue of the 9 *Geo.* 1, c. 7, s. 8. It is so long since that statute passed that it is impossible to discover what the practice as to adjourning appeals was before it did pass. *Anonymous*, 1 Str. 315, merely shews that the Sessions had a right to exercise a discretion in adjourning an appeal; but it does not appear whether the question there arose at the first or any subsequent Sessions. In the next year after the statute passed, it was held, that due notice not being given was no reason to quash the order, but might be a reason to adjourn the appeal. *Anonymous*, *Foley*, 245. In *Rex v. Justices of Gloucestershire* (a), where no notice had been given, this

(a) Dougl. 191.

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Court held that the Sessions were bound to adjourn. So also in *Rex v. Huntingdonshire* (a), where the notice, being served on a *Sunday*, was considered invalid, a similar decision was made. Now, it is very reasonable to suppose that the present universal practice of entering and respiting appeals as a matter of course has arisen from these decisions upon the statute; and, as in this case there was no notice before the *Summer* Sessions, the justices had no discretion to exercise at those Sessions whether they would allow the appeal to be entered and respited, but were *bound* by the statute to permit it to be done; the adjournment at those Sessions, therefore, was an adjournment by virtue of the statute. Now, if that be so, then the justices at the *Michaelmas* Sessions were bound by the express words of the statute to "then and there finally hear and determine the same." *Secondly*, the 9 *Geo.* 1, c. 7, s. 8, only applies to the first Sessions. *Rex v. N. R. Yorkshire* (b), *Rex v. Buckinghamshire* (c), and *Rex v. Staffordshire* (d), only apply to the first Sessions after the order was made. It must be admitted, that it never has been expressly held that the statute is limited to the first Sessions; but in *Rex v. Wilts* (e), where, as in this case, the question arose at the second Sessions, Lord *Ellenborough*, C. J., says, "The magistrates certainly had a discretion to exercise with respect to what was reasonable time for giving notice of appeal; but we have also a kind of visitatorial jurisdiction over them in the exercise of such a discretionary power." And in *Rex v. Lancashire* (f), which was a similar case, these observations were sanctioned by Lord *Tenterden*, C. J., and were acted upon by the Court. So, also, in *Rex v. Norfolk* (g), *Taunton*, J., said, "*Rex v. Bucks* has little or nothing to do with this case; that was

(a) Cald. 283.
 (b) 3 T. R. 150.
 (c) 3 East, 142.
 (d) 7 East, 549.

(e) 10 East, 404.
 (f) 7 B. & C. 691.
 (g) H. T. 1834, MSS.

grounded on 9 *Geo.* 1, c. 7, s. 8. The provisions of that statute are confined to the Quarter Sessions to which the appeal is made, and do not apply to subsequent Sessions." If, then, the statute be inapplicable to this case on either of the above grounds, and the magistrates had a discretion to exercise, this Court will not interfere in the present case. In *Rex v. W. R. Yorkshire (a)*, Mr. Justice *J. Parke* made some very strong observations against the interference of this Court with the discretion of the justices. The only ground for the present application is the ignorance of the attorney. Now his agents, Messrs. *McDonnell & Mostyn*, were well acquainted with the practice; and notice to them must be taken to be notice to the attorney and his clients, the appellants, in the same way as notice of a defect in a title to an estate to a *London* agent is notice to the attorney in the country and his client (*b*), even though such agent has been employed only in part of the transaction (*c*). At all events, the attorney was bound to make the necessary inquiries, as he had ample time for so doing, and actually did correspond with his agents touching the appeal, and he cannot now call on this Court to remedy the consequences of his own neglect. In *Rex v. Norfolk (d)*, where want of knowledge of a new practice was much discussed, *Taunton, J.*, observed, "I should say, it was the duty of the attorney to find out what was the practice; I do not feel the weight of the argument of non-knowledge, especially when this Court has been making new rules. I should be very sorry to give countenance to such an opinion."

Talbot, contra.—The 9 *Geo.* 1, c. 7, s. 8, may be admitted only to apply to the first Sessions after the execution of the order of removal. The ground on which it is sought to make the present rule absolute is, that the practice of the

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(a) 5 B. & Ad. 667; 3 N. & M. 757.

(b) Sugd. Vend. & P. 732.

(c) Id. 733.

(d) H. T. 1834, MSS.

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Sessions in the present instance is unreasonable; and that the Court ought to exercise its visitatorial power in order to correct the decision of the Sessions in furtherance of that practice. In the case of *Rex v. Wilts* (a), Lord *Ellenborough* says, "The magistrates certainly had a discretion to exercise with respect to what was reasonable time for giving the notice of appeal; but we have also a kind of visitatorial jurisdiction over them in the exercise of such a discretionary power; and we think, that, in this case, they have not exercised that discretion in a way that we ought to give effect to, but that we ought to interfere and correct it." The principle laid down in that case was confirmed in that of *Rex v. The Justices of Lancashire* (b), where Lord *Tenterden* said, in speaking of *Rex v. Wilts*, "They (the justices) certainly have a discretionary power to make rules for the government of the practice at the Sessions; but the case cited shews, that this Court, for the purposes of justice, will interfere to control that discretion." Again, in *Rex v. The Justices of the West Riding of Yorkshire* (c), a similar exercise of authority was made. There, the justices had improperly required a notice to be given by the appellants, and the Court issued a *mandamus* to compel them to hear the appeal. Here, great injustice would be the result of the present decision of the Sessions, if it were allowed to stand; and the object of the present application is, that the Court may interfere by *mandamus* to prevent it.

PATTESON, J.—The question here is, to what extent the Court will interfere with the jurisdiction, and with the exercise of the discretion of the Sessions. Though a doubt was raised last term, whether the 9 *Geo.* 1, c. 7, s. 8, applied to a subsequent Sessions, I take it to be a settled rule, at least I always thought so, that it only applied to the first Sessions. The extent to which the Court will interfere with

(a) 10 East, 404.

(b) 7 B. & C. 691.

(c) 5 B. & Adol. 667.

the Sessions is a matter that I do not like to determine at once. In *Rex v. Wilts*, the Judges seem to have gone a long way; but in *Rex v. W. R. Yorkshire*, Parke, J., stated that he did not approve of the observations in that case, that the Sessions were judges of what was reasonable notice. Now, if the Court in the case of *Rex v. Wilts* means only that we might interfere where there is no rule, it is quite right: if it means that we are to interfere in all cases where there is an existing rule, I should have considerable doubt.

Cur. adv. vult.

PATTERSON, J.—I have considered this case; I think it seems to have been agreed on both sides that the 9 Geo. 1, c. 7, s. 8, does not apply to the present case; that section unquestionably applies only to the first Sessions; and that section gives no jurisdiction further than this, whether the notice is a reasonable notice or not: but it goes on to say, that, if it is not a reasonable notice, then the justices are to adjourn the appeal. They *must* adjourn it. In this case, there was no notice at the first Sessions, therefore the statute was entirely out of the question. The whole matter, therefore, depends on whether this Court can interfere where the magistrates have laid down a rule, and have chosen to act upon the rule. *Rex v. Wilts* has been a good deal relied upon. That case is certainly one, in which some of the expressions have been, I will not say found fault with, but cautiously abstained from in later cases, because the Judges thought they went too far; that case proceeded entirely on this, that there was a new practice only existing for two Sessions, doing away with the former practice, and the attorney had acted in ignorance of that practice, and the Court thought that the Sessions had acted wrongly. How far there would be a similar decision now may be doubtful. But this case is not like that. Here,

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there is no suggestion, that the practice is a new practice; and I cannot say, that that practice is an illegal practice. The practice requires eight days' notice of an original appeal, and fourteen days' notice of an adjourned appeal: why more should be required in the latter case than in the former I do not see.

Greaves.—It is founded on this ground, that the respondents may naturally expect to have an appeal at the first Sessions after the order, and therefore eight days' notice will be sufficient; but, if the appellants pass by the first Sessions, the respondents will be lulled into security, and therefore are fairly entitled to a longer notice at the second Sessions.

PATTESON, J.—I suppose that may be so. There is nothing illegal in it. There is nothing so absurd in it as to require us to lay it down that it is not good. If the Sessions have thought fit to lay it down, they may abide by it. It was for the Sessions to determine whether they would adjourn. The Sessions seem to have differed in opinion, but that is immaterial. It was in the exercise of their discretion whether they would adjourn. It was purely a matter of discretion. Undoubtedly, there was no great hardship on the attorney; he was a stranger, but he ought to have informed himself of the practice of the Sessions where the case was to come on. Mr. *Talbot* relied on *Rex v. W. R. Yorkshire*. There, there was a special act allowing an appeal upon giving ten days' notice of appeal, and nothing was said about that appeal, supposing it to be adjourned. The Sessions refused to adjourn; and this Court said, that the Sessions were wrong, because there was no practice, which there could not be, as to that appeal. There was no general practice brought to the notice of the Court, and therefore they held that the Sessions

had acted wrongly in refusing to hear the appeal, there being nothing at all to shew that the party desirous of appealing was to give a notice at the second Sessions. Here there is a distinct practice of requiring such a notice.

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Rule discharged, with costs.

CHAPMAN, Executor &c., v. VANDEVELDE.

PLATT obtained a rule for discharging the defendant out of custody, and staying the proceedings in the action, for irregularity, on the ground that the plaintiff had previously issued and served three serviceable writs for the same cause of action against the defendant, and that those actions so commenced had not been discontinued.

A plaintiff may arrest a defendant after suing out three serviceable writs, the actions commenced by which he has not discontinued,

Butt shewed cause; and observed, that the affidavits in answer stated, that, although the previous actions had not been formally discontinued, the defendant had received notice not to appear to the writs, in consequence of their being irregular. But the rule was improperly obtained, as a plaintiff after suing out common process may sue out a bailable writ for the same cause, and arrest the defendant before he discontinues the first action. *Bishop v. Powell*(a). This was not a case within the rule of *Mich. 15 Car. 2*, which was intended to prevent a defendant from being twice *arrested* for the same course. The defendant should not have moved for the present rule; his course was to nonpros the plaintiff in the other actions, or to plead in abatement the pendency of the previous ones.

Platt, contrà.—In a case like the present, where the

(a) 6 T. R. 616.

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defendant has been harassed with so many writs, the Court ought to interfere and protect him. At all events, if the Court feels bound by the decision cited, the rule should be discharged, without costs.

Butt.—It is moved with costs for irregularity.

LITLEDALE, J.—The case of *Bishop v. Powell* decides the question. The plaintiff has not been guilty of any irregularity, and the rule must be discharged with costs.

Rule discharged, with costs.

DOE d. FROST v. ROE.

Special service
 in ejectment.

EVANS moved for judgment against the casual ejector. The affidavit on which he founded his application stated, that the deponent had gone to the premises in question, and had knocked at the door; he received no answer, but shortly afterwards heard some one, who he swore he believed was the tenant in possession, come to the door and apparently listen. The deponent then read the declaration aloud, and explained the object of it. He then thrust a copy of it through a pane in the window close to the entrance door, and there left it. The affidavit also went on to state, that the deponent believed the tenant in possession to be in the house at the time.

PATTESON, J.—I do not think that is sufficient to entitle you to a rule absolute; but you may have a rule *nisi*, the service to be in the usual way.

Rule *nisi* granted.

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LEAF v. JONES.

BUTT moved for an attachment against the sheriff for not bringing in the body. The affidavit stated, that the original rule (not a copy) was served on the under-sheriff, and which original rule was annexed to the affidavit of service. The officer of the Court did not like to draw up the rule for the attachment, without the point being first mentioned to the Court.

In moving for an attachment against the sheriff for not bringing in the body, it is sufficient to swear, that the original rule and not a copy was served on the under-sheriff.

PATTESON, J.—It appears to me that the service is quite sufficient.

Rule granted.

 REX v. CALDECOTT and Others.

KELLY moved for a writ of *certiorari*, to remove an indictment for conspiracy from the *Central Criminal Court*. His application was on the part of one of the defendants. The affidavit on which he moved stated, that the indictment charged the defendants with conspiring, for the purpose of procuring a divorce between a Mr. and Mrs. *Sargent*. The only fact on which this indictment could be founded was, that the defendant (Mr. *Caldecott*), who was a student for the bar, had been subpoenaed as a witness in a particular matter in which Mr. and Mrs. *Sargent* were interested. His affidavit proceeded to state, that, on the trial of the indictment in question, various difficult and important questions would arise as to the law of marriage and divorce. It was therefore important to him that the trial should take place before a Judge of the Court of *King's Bench*, when any point of law which might arise might not only be decided by a Judge of that Court, but the opinion which he should give could

The Court of *King's Bench* will, under special circumstances, remove an indictment for a misdemeanour from the *Central Criminal Court*.

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afterwards be reviewed by the four Judges in *Banc*. His affidavit also stated, that he was desirous of having the assistance of King's counsel, and of being tried before a special jury. No one of these advantages would he enjoy if the trial took place at the *Central Criminal Court*.

PATTESON, J.—It is by no means frequent with this Court to grant a *certiorari* for the removal of an indictment from the *Old Bailey*, because there the Judges of the superior Courts attend to try the indictments.

Kelly.—This being an indictment for a misdemeanour, it would not be tried until after the Judges had left the *Old Bailey*.

PATTESON, J.—I will speak to the other Judges on the subject, and give you our opinion to-morrow.

Cur. adv. vult.

PATTESON, J.—I have spoken to the other Judges, and we are of opinion that you should be allowed to take your writ.

On a subsequent day, an application having been made in the above case for a *procedendo*, it appeared that the application for the *certiorari* had not been made at the instance of all the defendants.

PATTESON, J.—Under the circumstances of this case, I should not have granted the *certiorari* if I had known that the application was not made at the instance of all the defendants.

It was ultimately agreed between the parties, that the trial should take place in the Court of *King's Bench*, at the Sittings after *Easter Term*.

Rule accordingly.

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RUSHWORTH v. BARRON.

ARCHBOLD moved for a rule *nisi* for setting aside an award. There was some doubt, whether, under the circumstances, the application was not too late. An action was commenced in the present case, and while it was pending the parties entered into an agreement to refer, instead of referring by an order of a Judge, or rule of Court. The reference proceeded, and an award was ultimately made in the course of *Trinity* vacation. The submission was subsequently made a rule of Court, pursuant to a clause to that effect in the agreement. The question was, whether the reference in this case was within the statute of 9 & 10 *Will.* 3, c. 15, s. 1; for, if it were, he admitted that it was too late to make the present application. He said, that, before this statute, where there was a cause in Court, the parties might have referred it to arbitration by a Judge's order or rule of Court; and the statute was passed for the purpose of enabling them to do so, under the like sanction of the Court, in cases where no action had been commenced; and as, in this case, the parties might have referred the matter in dispute, if the statute had never passed, he said it was fair to presume that it was not a reference within the statute; and if not, the parties were not bound to make this application within the time limited by the statute, but might make it within a reasonable time afterwards. *Rogers v. Dallimore* (a).

If parties agree to refer, there being an action pending, without a Judge's order, the reference is within the 9 & 10 *Will.* 3, c. 15; and an application to set aside the award must be made before the end of the term next after its publication.

PATTESON, J.—That might have been the case, if the parties had referred the cause by a Judge's order or rule of Court; but, instead of doing so, they adopted the mode pointed out by the statute, of a submission by agreement,

(a) 6 Taunt. 111.

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containing a clause that it might be made a rule of Court; which makes this a proceeding under the statute and not at common law.

Cur. adv. vult.

PATTESON, J.—It appears to me, that the reference in the present case is within the statute of 9 & 10 *Will. 3*, c. 15. The only limitation in that statute is, as to the nature of the controversy between the parties, and to which it applies. The words are, “it shall and may be lawful for all merchants, and traders, and others, desiring to end any controversy, suit, or quarrel, for which there is no other remedy but by personal action or suit in equity, by arbitration, to agree that their submission” &c. There is nothing said in the statute, as to whether the submission is to be by agreement, or order of a Judge. If they do agree that the submission shall be made a rule of Court, that is all to which the Court can look. It appears to me, that the parties have the option to do so, either by agreement or by order. Having done so by agreement, the case is within the statute, and the application is therefore too late, it not having been made before the end of the term next after the making and publishing of the award.

Rule refused.

FORBES v. WELLS.

A rule of Court, for the examination of witnesses on interrogatories in a foreign country, is not an absolute stay of proceedings, but only a limited one.

W. H. WATSON moved for a commission to examine witnesses on interrogatories at *Boulogne*. He made the application at the instance of the defendant; and he presumed that granting the rule would operate as a stay of proceedings.

PATTESON, J.—It is not a stay of proceedings in all

cases; for, if it were, it would prevent a plaintiff from proceeding altogether, if the defendant did not choose to execute the commission. The Courts, therefore, always make it only a stay of proceedings until a particular day. The rule may be drawn up in that way.

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Rule *nisi* accordingly.

Ex parte FRANKS.

PETERSDORFF applied to re-admit an attorney. His affidavit stated the fact of his regular admission, and taking out his certificate for a considerable period; that his clerk, who was accustomed to take out his certificate for him, had omitted so to do through inadvertence; that, without any knowledge of that neglect, he had continued to practise without his certificate. The affidavit, however, did not state that he had stuck up the usual term's notice, or given a notice to the *Stamp Office*. With respect to the first defect, it did not appear that a term's notice was necessary under such circumstances. He cited *Ex parte Anonymous* (a), in which it was decided, that, where an attorney has continued to practise after the expiration of his certificate through the inadvertence of a clerk, who has been in the habit of getting the certificate renewed, the Court will re-admit him without giving a term's notice. The case of *Ex parte Dent* (b) was to the same effect. With respect to the second omission, although it was not sworn that a notice had been given to the *Stamp Office*, the fact was so.

An attorney, who through inadvertence has practised without his certificate, cannot be re-admitted without an affidavit, shewing that a notice has been given to the *Stamp Office* of his intention to apply for re-admission.

PATTERSON, J.—Unless there is an affidavit to that effect, he cannot be re-admitted. The Court cannot act on the

(a) 1 Chitt. Rep. 163.

(b) 1 B. & Ald. 189.

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mere statement of such a notice having been given. If such an affidavit be produced, he may be re-admitted on payment of the arrears of duty and a nominal fine.

Rule accordingly.

GOUGE'S Bail.

Keeping a brothel is not of itself a ground for rejecting bail.

MANSEL opposed the bail in this case. On examining one of them, he admitted that he kept a brothel. This he submitted was a sufficient ground for rejecting bail.

PATTESON, J.—The mere fact of this man keeping a brothel is not of itself sufficient to render him incompetent to become bail. The sole question here is, as to his sufficiency of property. The infamy of his character is not alone enough to render him incompetent (*a*).

The bail was afterwards rejected, on the ground of insufficiency of property.

Bail rejected.

(*a*) See *Anonymous*, ante, Vol. 1, p. 160, where his Lordship refused to reject bail, merely on the ground of their keeping a gambling-house.

Ex parte GRANT.

Where an attorney disobeys a rule of Court, requiring him to do a particular act, an application cannot in the first instance be made to strike him off the roll; but a rule *nisi* for an attachment may be obtained.

WHITE moved for an attachment against an attorney for not paying certain costs; also, for a rule to shew cause why he should not be struck off the roll on the ground of not investing certain money pursuant to a rule of Court.

If by the same rule he is required to pay certain costs, and a clause is also introduced into it authorising the issue of an attachment in case of non-payment, that may at once issue although a rule *nisi* only will be granted for disobedience to the other part of the rule.

A bankrupt's certificate does not remove an attorney's liability to an attachment for not duly investing his client's money.

From the case of *Ex parte Townley* (a) it would appear, that the application could not be at once to strike the attorney off the roll, but must be for an attachment for not obeying the rule of Court. He was, however, entitled to an attachment in the first instance against the attorney, as the rule of Court was in these words:—"And it is further ordered, that, if he does not pay the said costs within the said time, an attachment shall issue."

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PATTESON, J.—I think that clause entitles you to an attachment in the first instance. In the case of *Ex parte Townley* it was decided, that a party cannot have a rule absolute, in the first instance, for an attachment for not paying costs pursuant to a rule of Court, where those costs form part of a rule for disobedience, to which a rule *nisi* only for an attachment can be granted. In that case, however, it does not appear that such a clause with respect to attachment as is here stated, was introduced into the rule. As to striking him off the roll, you cannot in this stage of the proceeding have a rule *nisi* for that purpose; but you may take a rule *nisi* for an attachment for not obeying the rule of Court.

White mentioned the fact of the attorney being a bankrupt, and having obtained his certificate since the time at which the investment of the money ought to have been made. He cited *Parker v. Crowle* (b), where it was held, that bankruptcy and certificate are no bar to an action in tort for selling out plaintiff's stock contrary to orders.

PATTESON, J.—The fact of his having obtained his cer-

(a) Ante, p. 3
VOL. III.

(b) 5 Bing. 63; 2 M. & P. 150.
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tificate will make no difference. This was not a debt, but a particular act which he ought to have done.

Rule absolute in the first instance for an attachment for not paying the costs; and *nisi* for an attachment for not investing the money.

Ex parte FROST.

Where a clerk has been unavoidably absent from his master's service for several months during the five years, but has served a similar period at the expiration of his articles, he may be admitted.

PLATT applied for leave of the Court to admit an articulated clerk as an attorney, under the following peculiar circumstances:—On the 31st of *December*, 1828, he entered into the service of an attorney in *Dorsetshire*, under articles of clerkship. He there remained, serving regularly for two years four months and a fortnight. At the time of his entering the service, his father did not pay the whole of the premium agreed. When the above period had expired, it became necessary that he should go into *Kent* to superintend the sale of certain property, with the proceeds of which it was proposed to pay the premium to the master; and accordingly, on the 6th *May*, 1831, he set out. During his absence, the master wrote to him a letter, in which he stated, that, unless his pecuniary demands were discharged, the clerk must not return. At length the necessary sum was raised, and, on the 27th of *December*, 1831, he returned to his master's service. It was then agreed between them, that he should serve such further period, beyond the expiration of his articles, as, exclusive of the period during which he had been absent, would, with the time of his actual service, amount to five years. He accordingly continued in service till the 15th of *October*. He had then served more than five years; and the only question was, whether, as the

supplemental period had been served after the expiration of the five years for which he had been articulated, that was sufficient within the meaning of the statute. The case of *Ex parte Hubbard* (a) was in point. There, the clerk had served the whole of the five years with the exception of two months; but at the end of that period he had served an additional two months. That was held to be a sufficient service to entitle him to be admitted.

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PATTESON, J.—Under the circumstances, and on the authority of that case, I think that this gentleman may be admitted.

Admitted.

(a) Ante, Vol. 1, p. 438.

DOE *d.* GOODWIN *v.* ROE.

BALL moved for judgment against the casual ejector. The venue was in the county of *Wilts*, and that county was stated in the body of the declaration. In the margin, however, *Gloucestershire* was mentioned. This, he submitted, was not material, the venue in the body of the declaration being right.

The venue in the margin in the declaration in ejectment is immaterial, if the venue in the body of the declaration is correct.

PATTESON, J.—That is sufficient. If the county stated in the body of the declaration is correct, the venue mentioned in the margin is unimportant.

Rule granted.

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ROWELL *v.* BREEDON.

If a plaintiff without improper motives has removed a judgment into a superior Court by an irregular writ of *certiorari*, issued without leave of the Court, such amendments will be allowed, and terms imposed, as will enable him to avail himself of the judgment, without prejudice to the defendant.

HAYWARD applied for a writ of *certiorari*, under the 19 Geo. 3, c. 70, s. 4, to remove a judgment obtained in an inferior jurisdiction, for the purpose of issuing execution thereon. The facts disclosed in his affidavits were these:— During the last vacation a writ of *certiorari* was issued, tested and returnable in vacation, without applying to either of the superior Courts at *Westminster*, and filing an affidavit, as required by the statute. The inferior Court, in obedience to the *certiorari*, returned the judgment. The question was, what course could be pursued under these circumstances, where all the proceedings were so irregular. It was submitted, that the Court might consider them as nullities, and issue a fresh writ of *certiorari*, or allow the leave of the Court now granted to have a retrospective operation in confirming what had been done.

PATTESON, J.—If a new writ of *certiorari* be issued, the inferior jurisdiction cannot return the judgment, because it is already in Court; and it is difficult to say, that the Court can act on it now it is here, because it has been brought here irregularly. *First*, the writ has been obtained in vacation, which is irregular, the leave of the Court being necessary. *Secondly*, it has been obtained without filing a special affidavit of the facts. *Thirdly*, it has been tested in vacation instead of term time. *Fourthly*, it has been made returnable in vacation instead of being made returnable on a day certain in Court, according to the practice of the *King's Bench*. The whole proceedings, therefore, are irregular. These irregularities do not appear to have been committed from any improper motive, but merely from inadvertence; and, therefore, I think you may take a rule to shew cause why the teste and return

of the *certiorari* and subsequent proceedings should not be amended, and why the plaintiff should not be at liberty to issue execution upon the judgment. As it is now late in the term, cause may be shewn at chambers. This course cannot work any injustice to the defendant.

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Rule *nisi* accordingly (a).

(a) If the *certiorari* issues out of Chancery it is an original writ, and may be tested at any time in term or vacation, and should be made returnable on a general return day. (Trye, 10). The ancient practice does not appear to be affected by 1 Will. 4, c. 3; for that statute applies only to "writs now usually returnable before any of his Majesty's Courts of King's Bench, Common Pleas, and Exchequer respectively;" and such a writ is returnable in the Court of Chancery. (1 Tidd, Prac. 406, ed. 9). Such a writ therefore will still be returnable on a general return day, although writs in the latter Courts, formerly returnable on general return days, "may

be made returnable on the third day exclusive before the commencement of each term, or on any day, not being Sunday, between that day and the third exclusive before the last day of the term." This will, of course, be always subject to the provisions of the Uniformity of Process Act. With respect to informality in writs of *certiorari*, it is to be observed, that third persons cannot object to the misdirection of a *certiorari* to remove a cause from an inferior Court, if the proper officers, in whose keeping the record was, waive the objection, and return the record upon such writ. (*Daniels v. Phillips*, 4 T. R. 499).

FRANCE and Others v. WRIGHT.

ARCHBOLD moved for an attachment for non-payment of costs pursuant to the Master's *allocatur*. The payment was directed to be made to some one of the plaintiffs or their attornies. The affidavit, however, on which he moved did not describe the parties, who denied the payment, as plaintiffs in the cause; nor did the affidavit deny payment to the attornies.

In order to obtain an attachment for non-payment of costs pursuant to the Master's *allocatur*, it must appear, by the affidavit, that the persons denying the payment are those mentioned in the *allocatur*.

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PATTESON, J.—In the case of *Johnson v. Smallwood* (a) it was decided, that, if a defendant seeks to set aside proceedings on the ground of not having been served with process, it must appear by his affidavit that he is the defendant in the cause. On the authority of that case, I think you are not entitled to your rule, as from the affidavit it does not now appear, that they who made the affidavit are the persons who were entitled to receive the money. Besides, I think you had better have an affidavit denying the payment to the attornies.

Rule refused.

(a) Ante, Vol. 2, p. 588.

NICHOLSON and Another v. NICHOLS.

Seemle, that the Court will make a conditional order for setting aside an outlawry, in order to prevent an insolvent from remaining in custody unnecessarily.

CLARKSON moved for a conditional order for setting aside an outlawry against an insolvent, under these circumstances:—The insolvent had taken the benefit of the act, and was sentenced to be imprisoned for a further period, which would expire on the 13th *March*. That would entitle him to be discharged from the outlawry; but, in order to set it aside, an application must be made to the Court in term time. The Court, according to the case of *Dixon v. Baker* (a), would not do that, until the insolvent has suffered the period of imprisonment directed by the Court of Insolvent Debtors, as that imprisonment was a condition precedent to his discharge. If the insolvent were to wait until the next term, as he was now in custody under the *capias utlagatum*, he must remain in prison unnecessarily from the 13th *March* until the 15th *April*, as the term did not commence till that day. Unless the Court therefore would interfere, by making a conditional

(a) Ante, Vol. 2, p. 517.

order for his discharge, the defendant would thus unnecessarily be deprived of his liberty for above a month.

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PATTESON, J.—In the case of *Dixon v. Baker*, the Court was required to set aside an outlawry before the defendant had suffered the period of imprisonment, the suffering of which was the condition of his discharge. The object of the application there was not to prevent any unnecessary imprisonment being inflicted on the defendant. I think, therefore, that you may take a rule to shew cause why an order should not be made for setting aside the outlawry, on condition that he continues in custody until the 13th March.

Rule *nisi* accordingly.

THE rule was afterwards enlarged to shew cause at Chambers.

Ex parte CIRKETT.

STEER applied for a rule to shew cause why a *mandamus* should not issue to the incumbent and churchwardens of the parish of *Elstow*, commanding them to restore a person named *Cirkett* to the office of parish clerk, from which he had been removed by the incumbent without cause.

PATTESON, J.—If the *mandamus* is issued, it must be directed to the incumbent. The churchwardens have no concern with the appointment of the parish clerk.

Steer.—The churchwardens have been very active in obstructing the clerk from the performance of his duties, and placing another in his situation. It does not appear that there has been any cause assigned for the removal of the applicant.

If a parish clerk has been deprived of his office, the *mandamus* to restore him must be directed to the incumbent, and not to the churchwardens.

To authorize such a *mandamus*, it must clearly appear that he has been deprived of his office.

Seemle, that he may be deprived by the incumbent for cause.

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PATTESON, J.—I am far from saying that the incumbent cannot remove him for cause. Has he appointed another person in his place?

Steer.—The affidavits do not shew that the incumbent has appointed another by any formal appointment; but he refuses to allow Mr. *Cirkett* to officiate, and employs another person to perform the duties of the office.

PATTESON, J.—The affidavits in such a case should shew clearly that the party has been deprived of his office, as the object of the *mandamus* is to restore him. You may, I think, on the facts which you state take a rule to shew cause.

Rule *nisi* granted.

WATERS v. WEATHERBY.

Where a plaintiff is prepared to try at one sittings, but, from the press of business, the cause does not come on, and those sittings last till the second sittings commence, but the plaintiff is obliged to withdraw his record on account of its not having been resealed, he is still not liable to the costs of the first sittings.

BUSBY shewed cause against a rule obtained by *Miller* for reviewing the Master's taxation. The facts were these:—Notice of trial had been given for the first sittings in last *Michaelmas* Term. The plaintiff was prepared to try throughout those sittings; and the defendant also attended there with his witnesses. The first sittings lasted until the end of the day before the second sittings; but the cause not being tried in consequence of the length of the list, it remained for trial at the second sittings. By accident, the attorney, however, neglected to reseat his record for those sittings, and therefore the cause was struck out of the paper. The cause was, however, ultimately tried, and the defendant obtained a verdict. On taxation, the Master refused to allow the defendant the costs of the first sittings. The object of the present rule was, that the Master might be directed to

review his taxation, on the ground that the defendant was entitled to his costs of attending at the first sittings. He was not, it was contended, entitled to those costs, as the plaintiff had been guilty of no default at the first sittings. The reason of the cause not coming on at those sittings was, that the Court was not in a situation to proceed with it. The plaintiff was, however, prepared to try, and had done every thing which could enable him so to do. There was, in fact, no default until the second sittings. The defendant, therefore, could not be entitled to obtain costs from the plaintiff when he had not been the cause of them.

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Miller, in support of the rule.—The expenses of the plaintiff at the first sittings were rendered useless by the default of the plaintiff at the second. He having thus been the cause of such expenses, he ought to re-imburse the defendant. The two sittings might in this case be considered in fact as but one.

PATTESON, J.—It cannot be said that these two sittings ought to be considered as one. They were two different sittings, and, when the second sittings began, the parties were in the same situation as if the first sittings had never existed. The difficulty apparently introduced into the case arises from the circumstance of the first sittings lasting till the second began. Here the reason for the cause being struck out was, that the record had not been resealed. But, supposing it had been resealed for the second sittings, there is no pretence for saying that the plaintiff would have been liable to the costs of the first sittings. If these sittings had been two months asunder there would have been no difficulty at all; and the fact of one sittings running into the other can make no difference. Suppose the cause had been made a *remanet* from one assize to another, in consequence of the Court not

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being able to try all the causes entered, there is no reason for saying that the plaintiff would have been liable to the defendant's costs at the first assizes. The reason is, that the delay is not the delay of the plaintiff, but the delay of the Court. The present rule must, therefore, be discharged.

Rule discharged.

Re JOSEPH HODGSON.

In order to enable the Court to punish an unqualified person who has acted in the name of an attorney with his knowledge, it is necessary first to shew, under the 22 Geo. 2, c. 46, s. 11, that such practice was with the knowledge of the latter.

If such knowledge be proved, on such an application, the Court will direct that he shall be required to shew cause why he should not be struck off the roll pursuant to the same section, although the party seeking to punish the unqualified person is not desirous of enforcing such a proceeding.

BAINES moved for a rule to shew cause why a person named *Joseph Hodgson* should not, under the 22 Geo. 2, c. 46, s. 11, be committed to the prison of the Court of *King's Bench* for a time not exceeding one year. The words of the section were, "Whereas divers persons, who are not examined, sworn, or admitted to act as attornies or solicitors in any Court of law or equity, do in conjunction with, or by the assistance or connivance of, certain sworn attornies and solicitors, and by various subtle contrivances, intrude themselves into and act and practise in the office and business of attornies and solicitors, to the great prejudice and loss of many of his Majesty's subjects, and the scandal of the profession of the law; be it therefore enacted, that, from and after the 29th day of *September*, 1749, if any sworn attorney or solicitor shall act as agent for any person or persons not duly qualified to act as an attorney or solicitor as aforesaid, or permit or suffer his name to be in any ways made use of upon the account or for the profit of any unqualified person or persons, or send any process to such unqualified person or persons, thereby to enable him or them to appear, act, or practise in any respect as an attorney or solicitor, knowing him not to be duly qualified as aforesaid, and complaint thereof shall be made in a summary way to the Court from

whence any such process did issue, and proof made thereof upon oath to the satisfaction of the Court, that such sworn attorney or solicitor hath offended therein as aforesaid, then and in such case every such attorney or solicitor so offending shall be struck off the roll, and for ever after disabled from practising as an attorney or solicitor; and in that case, and upon such complaint and proof made as aforesaid, it shall and may be lawful to and for the said Court to commit such unqualified person, so acting or practising as aforesaid, to the prison of the said Court for any time not exceeding one year." The affidavits on which he moved disclosed the following facts:—An action was commenced in *May*, 1834, by a person named *Robert Walker* against another named *William Walker*. In it, *Joseph Hodgson*, against whom the application was made, acted as attorney for the defendant. About the commencement of the month of *July* a search was made at the *Stamp Office*, and it was then discovered that *Hodgson*, who had been regularly admitted in the year 1827, had been uncertificated from *November* 1830 to *July* 1832. By operation of the 37 *Geo. 3*, c. 90, s. 31, he was absolutely off the roll after he had been one whole year without certificate, and had thus become an unqualified person. On the 23rd of *July*, 1834, a notice stating this discovery, and the liability to penalties consequently incurred, was sent to *Hodgson*. A notice to the same effect was also sent to the agent of *Hodgson*, who resided in *London*. On the 27th of *October* an order was obtained for changing the defendant's attorney, and the name of the agent was substituted as the attorney. The proceedings in the cause then went on in the name of the agent; and, after *Michaelmas* Term, *Hodgson* sent in his bill for business done during *Michaelmas* Term, but which had been transacted in the name of the agent. The defendant swore that he never employed any one as his attorney but *Hodgson*. These facts shewed, that *Hodgson*, being at the time an unqualified person,

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had acted in the name of an attorney, and therefore came within the meaning of the statute on which the motion was founded, and was therefore liable to the penalty provided by it.

PATTESON, J.—I do not see how you can reach *Hodgson* without first proceeding against the agent; for the words of the act of Parliament are, “every such attorney or solicitor, so offending, shall be struck off the roll, and for ever disabled from practising as an attorney or solicitor; and in *that* case, and upon *such* complaint and proof made as aforesaid, it shall and may be lawful to and for the said Court to commit such unqualified person, so acting or practising as aforesaid, to the prison of the said Court for any time not exceeding one year.”

Baines admitted, that, at that moment, he was not prepared with sufficient materials to shew that the agent was cognizant of *Hodgson* being off the roll.

PATTESON, J.—Unless you can bring the fact of *Hodgson* being off the roll home to the knowledge of the agent, I do not think, under the words of the act of Parliament, you can proceed against *Hodgson*.

Rule refused.

Baines on a subsequent day renewed his application, and produced an affidavit, the effect of which was to shew that the agent was conscious, at the time his name was used in the conduct of the cause, that *Hodgson* was off the roll.

PATTESON, J.—That will then entitle you also to a rule to shew cause on the other part of the clause, which renders the attorney liable to be struck off the roll for permitting such a person as *Hodgson* to practise in his name.

Baines said, he was not instructed to press the case as against the agent, as the illegality of *Hodgson's* conduct was equally great, whether the agent was conscious or not of his being off the roll.

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PATTESON, J.—If, from the reading of the affidavits on which you move, I perceive there has been great misconduct on the part of an attorney of this Court, I cannot avoid directing that he shall answer for it before the Court. You will, therefore, take a rule *nisi* against *Hodgson*, requiring him to shew cause why he should not be committed to the prison of this Court for a period not exceeding a year, and a rule *nisi* against the agent, requiring him to shew cause why he should not be struck off the roll.

Rules *nisi* accordingly.

WILTON v. CHAMBERS.

BARSTOW shewed cause against a rule obtained by the Solicitor-General, requiring *Henry Gill Paxton, Esq.*, late sheriff for the county of *Dorset*, to shew cause why he should not make a return to the writ of *fi. fa.* issued in the above case, and under which he had seized the defendant's goods. The facts of the case were these:—About four years ago a writ of *fi. fa.* came to the hands of the sheriff of *Dorsetshire* (*Mr. Paxton*), requiring him to seize the goods of the defendant. He accordingly effected a seizure, and soon after received notice from the assignees of the defendant that a commission of bankrupt had issued against him, and, therefore, that he must not proceed to sell. The sheriff then applied to the Court of *King's Bench*, which Court from term to term enlarged the return of the writ. Afterwards, under the Interpleader Act (which had passed in

A sheriff, under special circumstances, may be compelled to return a writ of *fi. fa.*, although he has been three years out of office, and has, by leave of the Court, withdrawn from possession of the property seized.

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the mean time), rules were made, which brought the assignees before the Court; and ultimately a rule was drawn up by the authority of the Court, empowering the sheriff to withdraw, with liberty to re-enter, by leave of the Court, in case the invalidity of the commission should be decided in a cause of *Bernasconi v. Farebrother*, then depending. That cause was afterwards tried, in which the assignees were plaintiffs, and were nonsuited on the ground of their not establishing the act of bankruptcy. An application was then made on the part of the present plaintiff to compel the sheriff to re-enter and take possession of the defendant's goods. On that occasion the Court said, "If the sheriff thinks proper to re-enter, he may do so under the terms of the rule; but if he does not, the Court has no power to compel him to re-enter (a)." The same reasons which existed at the time of making that application for not granting it, now existed against the present. How was it possible for a sheriff to re-enter and seize the same goods which he had formerly seized, when so great a length of time had elapsed since he had gone out of office? All identity of the property must now be completely destroyed. The sheriff was now out of office; the bailiff who had originally entered was dead, and no official seal now existed of which he could make use. It would be most unjust to require the sheriff to make a return to the writ, when the only consequence must be, if he were to make any effectual return, that he must render himself a trespasser.

The *Solicitor-General* and *R. Alexander*, in support of the rule, contended, that, although the Court might not feel itself authorized to compel the sheriff to re-enter, there could be no objection to the sheriff being compelled to make a return to the writ which had been placed in his

(a) Ante, p. 12.

hands, and which he was bound to execute. If he thought fit he might make a return of the special circumstances; but unless some return were made, the plaintiff would be without any remedy.

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Cur. adv. vult.

PATTESON, J.—I have had considerable difficulty in determining what I ought to do in the present case. If the rule of the last term alluded to by Mr. *Barstow* was discharged, on the ground that the sheriff had a discretion to exercise as to whether he would re-enter or not, the party interested in the matter has still a right to know in what way he has exercised that discretion. The present rule requires the sheriff to shew cause why he should not make a return to the writ. Now, under the circumstances, I do not see how I can avoid making the rule absolute. He shall, however, have time to return it until the fifth day of the next term.

Rule absolute accordingly.

DOE d. PROBERT v. ROE.

V. WILLIAMS moved for leave to sign judgment against the casual ejector. The venue was in *Wales*; and one of the tenants, who was a *Welchman*, did not understand *English*. The deponent, who went to serve the ejectment, was unable to speak *Welsh*. He therefore induced another tenant, who did understand both languages, to explain the nature and object of the declaration. The deponent heard and saw the tenant speaking, and, as he believed, interpreting the explanation which he gave.

Where it became necessary to employ an interpreter, in order to explain to the tenant the object of the declaration in ejectment, but who was not upon oath:—*Held*, that the explanation was sufficient to entitle the lessor of the plaintiff to sign judgment.

PATTESON, J.—I think that is sufficient to entitle you to sign judgment.

Rule granted.

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DOE *d.* DARWENT *v.* ROE.

A notice at the foot of a declaration in ejectment, omitting to state that the consequence of the action not being defended will be turning the tenant out of possession, is defective, but may be amended on terms.

DOWLING moved for judgment against the casual ejector. The peculiarity of the case was, that, in the notice at the foot of the declaration, the words "you will be turned out of possession of the same" were omitted to be stated, as the legal consequence of the action not being defended by the tenant. The notice merely informed the tenant that judgment by default would be suffered.

PATTESON, J.—I think that is not sufficient, as the consequence of the action not being defended is not sufficiently pointed out.

Dowling then suggested, that the Court might allow an amendment in such a case; and cited *Doe d. Bass v. Roe (a)*, where the Court allowed a notice at the foot of the declaration in ejectment to be amended, by inserting "*Hilary*" instead of "*Easter*" Term. There would, perhaps, be no objection to a rule being drawn up in this form, to shew cause at chambers within a week, why the notice at the foot of the declaration should not be amended, by the introduction of the words "you will be turned out of possession of the same," and why the lessor of the plaintiff should not be at liberty to sign judgment against the casual ejector.

PATTESON, J.—I think there is no objection to that course.

Rule *nisi* accordingly.

(a) 7 T. R. 469.

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GREEN v. BROWN.

SEWELL applied under the 1 & 2 Will. 4, c. 58, s. 6, (the Interpleader Act,) on the part of the sheriff, who had received notice of various claims on certain property seized by him, under a writ of execution issued by the plaintiff against the defendant's property. He thought it right to mention, that no declaration had been delivered in any action against the sheriff.

Under the 1 & 2 Will. 4, c. 58, s. 6, (the Interpleader Act,) the sheriff need not wait for proceedings to be taken against him before he applies to the Court for relief.

PATTESON, J.—That is of no importance in an application of this sort, on the part of the sheriff, under s. 6 of this act. It would be necessary, if it were made under s. 1 of the act, on the part of a stakeholder. There, it is necessary, by the words of the statute, that it should be made “after declaration, and before plea.” But, under the 6th section, the words are “when any such claim shall be made to any goods or chattels taken or intended to be taken in execution under any such process, or to the proceeds or value thereof; it shall and may be lawful to or for the Court, from which such process issued, upon application of such sheriff or other officer, made before or after the return of such process, *and as well before as after any action brought* against such sheriff, or other officer, to call before them” &c. The sheriff, therefore, need not wait for any action to be brought against him before he makes an application to the Court for relief. You may therefore have your rule.

Rule *nisi* granted (a).

(a) See 2 Dowl. Stat. 569.

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Ex parte FRY.

Where an attorney, through the negligence of his clerk, has omitted to make the entry pursuant to the 37 Geo. 3, c. 90, s. 27, in due time, the Court will allow that entry to be made *nunc pro tunc*, if he has taken out his certificate regularly, and paid the duty for that year.

DOWLING moved to enter the name of an attorney in the book at the Master's office *nunc pro tunc*. The affidavit on which he moved stated, that the applicant had been regularly admitted, taken out his certificate, and paid the legal duty down to the present time; that he had caused it to be entered regularly pursuant to the 37 Geo. 3, c. 90, s. 27, down to the present time, with the exception of the previous year. This omission arose in consequence of the negligence of his clerk, and the fact of such omission had not come to his knowledge till within the last month. The affidavit further went on to state, that he had not omitted to make the entry from any improper motive, and that he was not aware of any proceeding having been commenced for the recovery of any penalties to which he might have been subjected by the said statute. Under these circumstances it was submitted that the entry might be made *nunc pro tunc*. No injury could be caused to any person or to the revenue, since the applicant had paid the certificate duty regularly.

PATTESON, J.—I think the name may be entered *nunc pro tunc*, which will protect him from any penalties he may have incurred by practising without such entry having been made.

Rule granted.

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Ex parte PHILPOT.

O'MALLEY moved to re-admit an attorney. The affidavit on which he founded his application stated, that the attorney had been regularly admitted, and for a number of years taken out his certificate; but had discontinued to do so, on account of poverty, for one whole year. During that period he had continued to practise, but only in two instances; one of which was a case in which he himself was a party, and the other one in which he acted for another person. From that second suit, he had hoped to have obtained the means of taking out his certificate, but had been disappointed.

If an attorney practises after the expiration of his certificate, even though with the hope of taking one out, he cannot be re-admitted without payment of the arrears of duty for the years during which he has practised, and something more than a nominal fine.

PATTESON, J.—He may be re-admitted on payment of the year's duty, and forty shillings fine. If a man finds that he cannot, from want of means, take out his certificate, he must not be encouraged to go on practising without his certificate, upon the chance of his being able to get money enough to take it out.

Admitted.

NOKES v. FRAZER.

HUMFREY shewed cause against a rule *nisi* obtained by *Hayes* for reviewing the Master's taxation in this case. The facts were these:—At the last *Warwick* Assizes, after the cause had been called on, it was referred to an arbitrator, with directions to him to make a certificate as to the amount for which the verdict should be entered. After hearing both parties, he gave a certificate for 2*l.* 10*s.*; and a verdict for that amount was accordingly entered. The question then was, according to what scale, the plain-

Under the directions to taxing officers promulgated in *H. T. 4 Will. 4*, it is not necessary for the judge who certifies, to enable a plaintiff to obtain full costs, to hear the cause throughout.

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tiff's costs were to be taxed, the verdict being under 20*l*. By the directions to taxing officers promulgated by the Judges in *Hilary* Term, 4 *Will.* 4, it was provided that "in all actions of *assumpsit*, debt, or covenant, where the sum recovered or paid into Court and accepted by the plaintiff in satisfaction of his demand, or agreed to be paid on the settlement of the action, shall not exceed 20*l*. (without costs), the plaintiff's costs shall be taxed according to the reduced scale hereunto annexed. Provided that in case of trial before a Judge in one of the superior Courts or Judge of assize, if the Judge shall certify on the *postea* that the cause was proper to be tried before him and not before a sheriff or judge of an inferior Court, the costs shall be taxed on the usual scale (a)." An application was then made to the Judge, before whom the cause had been referred, for his certificate that it was a fit cause to be tried before him. His Lordship then suggested an application to the arbitrator, and the latter gave a certificate that it was a proper cause to be tried before a Judge at *Nisi Prius*. The Judge then certified on the *postea* that it was a proper case to be tried before him. The Master then taxed the plaintiff's costs on the usual scale and not the reduced scale. The only difficulty in the case was as to the power of the Judge to give such a certificate.

PATTERSON, J.—The question is, whether the Judge had power to certify in a case which he had not heard entirely through.

Humfrey.—That is the question. There is nothing to shew on the *postea* that the case was ever taken out of the hands of the Judge and jury. In making up the record it will appear that the Judge has given his certificate after hearing the trial, and so the proceedings will appear per-

(a) Ante, Vol. 2, p. 485.

fectly regular. The Judge has certified that it was a proper case to be tried before him, and therefore the Master was right in taxing the plaintiff his costs on the usual scale.

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Hayes, in support of the rule, contended, that a certificate for such a purpose as the present could not be granted where the Judge had not heard the whole case. The reason for this was very obvious; as, unless a Judge had heard the whole of it, he had no premises on which to decide. This must clearly be the case from the very language of the rule which spoke of "trial," and "tried." The meaning of those words evidently was, that the cause must be fully tried before the Judge, otherwise no "trial" could take place; nor could it be said that it had been "tried" before him.

Cur. adv. vult.

PATTESON, J.—This case depends on the meaning to be attached to the words "trial before a Judge in one of the superior Courts or Judge of assize." It is said that the Judge has no power to make a certificate unless he has heard the whole cause himself. I think that the meaning of the above words is in case of a cause being "brought on for trial," and that it is not necessary that it should be entirely tried before him. When it is brought on for trial, it is for him to determine whether, under all the circumstances, it ought to have been tried before him. As the cause went on, he might be able to perceive that it was a proper one to be tried before him; although it might afterwards be referred to some other person to certify for what amount the verdict of the jury should ultimately be entered. If the whole matter had been referred to an arbitrator, it might have been more difficult to decide that the Judge could give such a certificate; though I do not say that he might not even then certify. But it is quite clear that where the barrister was substituted for the jury, as to the amount, the Judge was right in taking

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the opinion of that gentleman. Again, I observe, that in my opinion the word "trial" means "brought down for trial." The present rule must, therefore, be discharged. I say nothing about costs.

Rule discharged.

Ex parte Joy.

Where a clerk has been articled to a second master pursuant to the 22 Geo. 2, c. 46, s. 9, and the affidavit of such articles has not been filed within three months after their execution, in accordance with section 3 of that statute, he cannot be admitted, nor can such affidavit be filed
nunc pro tunc.

HUMFREY moved to admit an attorney under the following circumstances:—The person on whose behalf he applied had been articled for five years to an attorney of this Court. Four of those years he served with that gentleman. The latter then leaving off practice, he was articled to another attorney for one year. An affidavit of the execution of that second contract was not filed within three months after its execution according to the provisions of the 22 Geo. 2, c. 46, s. 9. That section, after providing for those cases in which the complete service of five years could not be effected with the same attorney, contains these words:—"so as an affidavit be duly made and filed of the execution of such second or other contract or contracts within the time, and in like manner as is before directed concerning such original contract." By section 3 it is directed, that "every person who shall be bound by contract in writing to serve as a clerk to any attorney or solicitor, as by the same act is directed, shall, within three months next after the date of every such contract, cause an affidavit to be made and duly sworn of the actual execution of every such contract by every such attorney or solicitor and the person so to be bound to serve as a clerk as aforesaid," &c. By section 4 of the same act, it is provided that "no person who shall become bound as aforesaid shall be admitted or enrolled an attorney or solicitor in any Court in the

said act mentioned, before such affidavit so marked by the proper officer shall be produced and openly read in the Court where such person shall be admitted and enrolled an attorney or solicitor." The question was, whether under these circumstances the Court could allow him to be admitted; the filing of such affidavit within three months being constituted by the act a condition precedent to the admission.

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PATTESON, J.—The words of the act are so strong that I do not feel myself authorized to permit this gentleman to be admitted.

Humfrey suggested that the affidavit might be filed *nunc pro tunc*.

PATTESON, J.—The act of Parliament positively requires that the affidavit shall be filed within three months after the execution of the articles. Under these circumstances, I cannot allow it to be now filed.

Refused.

In Giffen v. Gilbert, 7. C. B. 161.

GARDNER v. GREEN.

JEREMY moved to make absolute a rule *nisi*, for referring it to the Master to compute principal and interest on a bill of exchange. The affidavit, on which he grounded his motion, stated, that the deponent had left the rule *nisi* with the landlady of the defendant. No acknowledgment had afterwards been made by the defendant, that the rule *nisi* had ever come to his hands.

Service of a rule *nisi* to compute on the defendant's landlady is not sufficient.

PATTESON, J.—That is not sufficient.

Rule refused.

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BAYNTON and Others *v.* HARVEY.

If an execution creditor abandons his process against certain goods seized under a *fi. fa.*, in favour of a claimant, the sheriff has still a right to shew in an action against him, that the goods were the property of the defendant.

THIS was a sheriff's rule, under the Interpleader Act. It appeared from the affidavits read, that the sheriff had seized certain goods which he presumed to belong to the defendant. While in possession, he received notice from a third person that the goods belonged to him. The sheriff then applied to the plaintiff for an indemnity. This he refused, on the ground of the value of the goods being only 25*l.*, and therefore they were not worth the expense of a contest for them. The sheriff then sold, and applied to the Court for relief, under the sixth section of the Interpleader Act.

Comyn appeared for the execution creditor, and contended, that after his client had given notice that he would not litigate the property of the goods, the sheriff had no right to compel him to come to the Court. He had abandoned his process, and therefore the sheriff had no occasion to pray for relief. The execution creditor was therefore entitled to his costs against the sheriff.

Platt appeared for the claimant, and submitted, that after the execution creditor had refused to make any effort to enforce his claim on the goods in question, the sheriff need not have continued in possession, and therefore was not entitled to relief. If that were so, he had no right to bring the parties before the Court, and therefore he ought to pay the costs of the claimant's appearing.

Chadwicke Jones appeared on behalf of the sheriff, and contended, that he having made a seizure under a *fi. fa.* of certain goods, and received notice of a claim to them, and been refused an indemnity from the plaintiff, he could not avoid coming to the Court.

PATTESON, J.—It seems to me, that the sheriff is not to blame. The fact of his selling is of no consequence, as far as he is concerned. If he had a right to come to the Court, while the goods were in specie, he had also a right to come here when he had sold them. When he had sold certain goods, which he thought belonged to the defendant, and he found that he could not obtain an indemnity from the plaintiff, he was compelled to come here to protect himself. But although the fact of sale may be of no consequence as far as the plaintiff is concerned, it may have been productive of injury to the claimant; and he will have a right of action against the sheriff. The sheriff will then have a right to defend himself, by shewing that the goods were really the property of the defendant, and therefore that he was not a trespasser in taking and selling them. The present rule, therefore, must be discharged, without costs, as far as it concerns the plaintiff; and the costs of the claimant will depend on the event of the action to be tried between him and the sheriff, and will be costs in the cause.

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Rule accordingly.

—◆—
REX v. GIBBS.

CHILTON applied for leave to compound a penal action, where a portion of the penalty was to go to the Crown. He laboured under one difficulty, which was, that he had not the consent of the Attorney-General for that purpose, nor was he aware that any gentleman had been instructed to consent on the part of the Crown.

Leave of the Court for compounding a penal action, where the Crown is entitled to a portion of the penalty, cannot be obtained without the consent of the Attorney-General.

PATTESON, J.—Unless you have the Attorney-General's consent, the Court cannot grant you leave to compound; for if it were, an interference with the interests of the Crown

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would be made without the knowledge or authority of its officers. If you can obtain the Attorney-General's consent, you may draw up the rule, but not till then.

Chilton then applied to be allowed to take his rule conditionally on production of the Attorney-General's consent at the office.

PATTESON, J.—You may take your rule in that form.

Rule accordingly.

WILLS v. G. HOPKINS.

BRAGG v. The Same.

Where an issue is directed to be tried between an execution creditor and a claimant, brought before the Court by the sheriff, under the Interpleader Act, but the latter refuses to try, and abandons his claim, he will be liable to pay the execution creditor's costs down to the time of the claim being abandoned, and of applying to take the money paid in by the sheriff out of Court.

BUTT obtained a rule calling upon *John* and *James Hopkins* to shew cause why a sum of money paid into Court, in pursuance of rules made in these causes in this Court and in the *Common Pleas*, to abide the event of an issue (a), should not be paid out to the plaintiffs, and why *John* and *James Hopkins* should not pay the plaintiffs their costs, under the Interpleader Rule, and also the costs of the rule in the *Common Pleas*, and the costs of this application. The motion was founded on an affidavit, which stated that the plaintiffs issued writs of *fi. fa.* against the goods of the defendant; that the late sheriff of *Dorset* levied in pursuance of the writs; but, while the goods were in his hands, *John* and *James Hopkins* (the father and brother of the defendant) claimed the goods under an assignment from the latter. The sheriff then applied to this Court and the Court of *Common Pleas*, (one of the writs being founded on a judgment in that Court), under the Interpleader Act. A rule was made

(a) Ante, Vol. 2, p. 151.

that the money should be brought into Court, to abide the event of an issue in which *John* and *James Hopkins* were to be plaintiffs, and the execution creditors defendants, to determine the validity of the assignment. The issue was ordered to be tried at the next assizes for *Dorset*. The claimants *John* and *James Hopkins* did not proceed to trial according to the rule, but declared that they did not intend to try the question. After the assizes at which the trial was to have been had, they gave a written authority to the sheriff to sell the goods, and pay the proceeds to the execution creditors, in satisfaction of their levies, together with costs. The sheriff accordingly sold, and for his security paid the money into Court, under the Interpleader Rules. It also appeared by the affidavit, that the plaintiffs had applied to *John* and *James Hopkins* for the costs in question, and their consent to the money being paid out of Court; to which the answer was, that they would consent to the money being paid out of Court to the plaintiffs, but refused to pay the costs. And now—

Crowder and *G. T. Williams* (for *J.* and *J. H.*) shewed cause. They admitted that the plaintiffs were entitled to the money in Court, but contended, that the plaintiffs were not entitled to the costs prayed for by the rule. The present was an attempt to enforce against persons who were not attorneys or officers of the Court, the written undertaking given to the sheriff. The Court had no authority to do this. As to the costs of the Interpleader Rules, the issue had not been tried, and the authority given to the sheriff put an end to the question, by an arrangement which was in the nature of a compromise. Then as to the costs of the present application, they were incurred by the act of the sheriff, in paying the proceeds into Court, instead of pursuing the written authority, and paying the money to the plaintiffs. With respect to the

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costs of the rule in the *Common Pleas*, this Court cannot exercise any jurisdiction.

Butt, contra.—The application is not founded upon the written authority given to the sheriff, but upon the 6th section of the Interpleader Act, by which the Court has a jurisdiction to award costs as they may consider right and expedient. Then, is the present a case in which the Court should exercise their discretion? The facts are all on one side:—the judgment debtor, on the eve of an execution, making an assignment of his effects to his relations, those persons claim the goods, and the sheriff comes to the Court for relief; an issue is directed, and then they abandon their claim, after putting the judgment creditors to great expense and delay. If the persons putting forward an unfounded claim were not compelled to pay the costs occasioned by their conduct, it would operate as a premium to induce persons to put forward pretended claims, in order to defeat execution creditors of the fruits of their levies. In similar cases, the Courts have invariably awarded costs. In *Perkins v. Burton* (a), where a party made a claim, and afterwards abandoned it, the Court fixed him with costs. And so, in *Bowen v. Bramidge* (b), where the claimant failed on the trial of an issue. Those cases in principle decide the present. Then, as to the costs of the rule in the *Common Pleas*, it was agreed, when the issue was directed, that all the parties should be bound by the issue, and that circumstance gives this Court a jurisdiction over the costs of the rule in the *Common Pleas*; and it is very desirable that it should be so, in order to avoid the expense and circuitry of a distinct application in each Court. With respect also to the costs of the present application, the plaintiffs are clearly entitled

(a) Ante, Vol. 2, p. 108.

(b) Ib. 213. See also *Seaward v. Williams*, ante, Vol. 1, p. 258.

in justice to them. They could not obtain their money without making the application; and it is right that those who by a pretended claim occasioned the necessity of so doing, should bear the expense of this motion.

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WILLIAMS, J.—There is no reason why the plaintiffs should not have their costs up to the time when the issue was abandoned by the claimants, and also the costs of the application to obtain the money out of Court. It must be taken that there was an unfounded claim, the consequence of which has been the costs in question; and it is manifestly just, that those who put forward the claim should be answerable for the consequences of their own acts. With regard to the costs of the rule in the *Common Pleas*, I am not satisfied that I have power to award them.

Rule absolute for the payment of the money out of Court, together with the costs up to the time of abandoning the issue, and the costs of the application.

But see Reg. v. St. Mark's Rectory, 6 Q. B. 297, 16 (5)

SHERRY v. OKE and Others.

THE *Solicitor-General* and *Barstow* shewed cause against a rule for setting aside an award, for matter apparent on the face of it. They objected that the Court

A rule for setting aside an award must appear, on the face of it, to be drawn up on reading

the award itself or a copy of it; and the Court will not allow it to be amended.

Where a rule for setting aside an award was drawn up on imperfect materials, and was therefore discharged; the Court, under special circumstances, allowed a new rule.

In the *King's Bench*, the Court may look at the record on discussing a motion for a new trial, although the rule is not drawn up on reading it; therefore, the Court may look at the record on an application to set aside an award made pursuant to an order of *Nisi Prius*, although the rule is not drawn up on reading it.

If it clearly appear, from reading an award, that the arbitrator intended to leave a particular question of law open, the Court will consider it, although in terms the arbitrator may in one part of his award have determined it.

Interest paid by a purchaser upon money borrowed by him to complete the purchase, and kept idle, (pending an endeavour by the vendor to clear up the title), may be recovered as damages against the latter in an action for breach of his contract.

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could not look at the award, as it was not in fact before them. The rule for setting aside the award was drawn up on reading the affidavit of the clerk of the barrister to whom the cause had been referred, and no copy of the award was annexed to that affidavit. The rule also was not drawn up upon reading the award; nor was there any reference to it on the face of the rule. The award, therefore, not being before the Court, no objection to it could now be considered. One of the grounds for setting aside the award was a variance between the evidence and declaration; but the Court was not at liberty to look at the declaration, the rule not being drawn up on reading it, or referring to it in any way.

Bompas, Serjt., and *Erle*, in support of the rule, contended, that even if this objection were available, the Court would allow the rule to be amended, in order that the real justice of the case might not be disappointed. They cited *Price v. James* (a), where the Court had interfered to a much more important extent by way of amendment. There the christian and surname in an order of reference were transposed, and the Court allowed the mistake to be amended.

PATTESON, J.—My present impression is, that I cannot allow an amendment in this case, as required.

Cur. adv. vult.

PATTESON, J.—I have looked into the authorities, and consulted the rest of the Judges of this Court, and we are all of opinion, that we have no power to make this amendment. There are two objections to this rule. The *first* is, that the rule was drawn up on reading the affidavit of the arbitrator's clerk, to which a copy of the award was

(a) Ante, vol. 2, p. 435.

not attached; and not upon reading a copy of the award, and with no reference on the face of the rule to the award. The *second* objection was, that the rule ought to have been drawn up on reading the record and the declaration, one objection as it appears being on the declaration. With respect to the first objection, I have already said, that we are all of opinion we cannot make the amendment required, and therefore the present rule must be discharged, but without costs. As to the second objection, however, there is a difference between the practice of this Court and the *Common Pleas*. In this Court, if a rule is obtained for setting aside a verdict, it is drawn up without an allegation that it was so drawn up upon reading anything. But in the *Common Pleas*, it is drawn up upon reading the record. As this was a case in which a verdict was taken subject to arbitration, I think, on the motion to set aside the award, I may look at the record, in the same manner as I could on a motion for setting aside a verdict, although it is not mentioned in the rule. This, however, will not avail the party who seeks to set aside the award, as the Court is of opinion that the first objection is fatal. If I were to allow the amendment to be made, it could only be done on an affidavit that the document was in the same state at the time of granting the amended rule as at the time of obtaining the original one. Then the rule would appear to be drawn up on reading an affidavit, sworn after the rule had been granted. I regret that this rule should be discharged on so strictly technical an objection, but I feel that the Court has no power to allow the amendment.

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Rule discharged without costs.

Bompas, Serjt., and *Erle*, afterwards applied for a fresh rule to shew cause why the award in this case should not be set aside, on various grounds apparent on the face

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of it. The *first* ground was, that too many persons had been made defendants. *Secondly*, that the arbitrator had allowed certain sums for interest, to which the defendants were not entitled. The facts of the case were these:—It was an action of *assumpsit*, brought by the purchaser against the vendors of the *Star Inn*, at *Southampton*. After the cause had been called on, it, with all matters in difference between the parties, was referred to a gentleman at the bar, with directions to him to find the facts specially, and to state any matters of law, which the parties might request, on the face of his award. A verdict was then taken for the plaintiff, subject to such award. The arbitrator, having heard the case, made his award in these terms. After reciting that the cause and all matters in difference had been referred to him, it proceeded:—"I award and find that the defendants did undertake and promise in manner and form as the plaintiff has in the first count of his declaration in that behalf alleged; and I assess the damages sustained by the plaintiff, by reason of the non-performance of the said promise and undertaking, in the several sums following; that is to say, *first*, in the sum of 148*l.* 6*s.* 3*d.*, for the payment of one moiety of the auction duty paid by the plaintiff to the defendants; *secondly*, in the sum of 189*l.* 6*s.* 3*d.*, being interest upon the said sum of 148*l.* 6*s.* 3*d.*, and also upon the deposit mentioned in the declaration, amounting to 1017*l.*, from the 27th *August*, 1830, to the 20th of *November*, 1833, when the deposit was repaid by the defendants to the plaintiff; *thirdly*, in the sum of _____, for interest on the sum of 148*l.* 6*s.* 3*d.*, auction duty, from the 27th *November*, 1833, to _____; *fourthly*, in the sum of _____ for interest on the said sum of 148*l.* 6*s.* 3*d.* from the date of the said order of reference, until the making of this my award; *fifthly*, in the sum of 105*l.* 1*s.* 9*d.*, being a sum paid by the plaintiff to a Mr. *Morris*, in pursuance of an agreement, whereby, in consideration

that Mr. *Morris* would hold in his hands unemployed the sum of 3153*l.*, ready to be advanced to the plaintiff, for the purpose of enabling him to complete the purchase of the property mentioned in the declaration, the plaintiff undertook to pay Mr. *Morris* interest on the said sum of 3153*l.*, for so long time as the same should be in his hands unemployed, for the purpose of enabling the plaintiff to complete the said purchase, it being proved to my satisfaction, that Mr. *Morris* did so hold the same, for the purpose aforesaid, for the period in respect of which the said payment of 105*l.* 1*s.* 9*d.* was made, during which period a negotiation was pending between the plaintiff and the defendants, with a view to remove the defects in the defendant's title to the said property, and their difficulties in obtaining the means of effecting a conveyance thereof to the plaintiff; *sixthly*, in the sum of 122*l.* 8*s.* 4*d.*, being a sum which the plaintiff had rendered himself liable to pay to Mr. *King* under an agreement, by which, in consideration that Mr. *King* would hold 2500*l.*, at his (*King's*) bankers, for the purpose of advancing and lending the same to the plaintiff, in order to enable him to complete the said purchase, the plaintiff engaged to indemnify Mr. *King* against the loss of interest which he would sustain by reason of his so holding the said sum of 2500*l.*, it being proved to my satisfaction that Mr. *King* did so hold the said sum of 2500*l.*, for the period in respect of which the said sum of 122*l.* 8*s.* 4*d.* is claimed, during which period a negotiation was pending between the plaintiff and the defendants, with a view to remove the defects of the defendants' title to the said property, and the difficulties in obtaining the means of effecting a valid conveyance thereof to the plaintiff; and that the said Mr. *King* had sustained such loss; *seventhly*, in the sum of , for expenses necessarily incurred by the plaintiff in investigating the title to the said property. And as to the other counts of the declaration, I find that the

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defendants did not undertake or promise, in manner of form as the plaintiff has in those counts complained against the defendants. And I do, at the request of the defendants, state the following facts, from which I have inferred, that the plaintiff is entitled to a verdict upon the issue joined between the parties. The defendants, *E. L. Oke* and *Sarah Bell*, are devisees and legatees in trust of the freehold and leasehold property in question, under the will of *John Bell* deceased, under which they had no power of selling the said property at the time of the contract of sale mentioned in the first count of the declaration, without the concurrence of all the persons who were beneficially interested in the said property—the defendants *Sarah Bell*, *William Bell*, and *Helen Taplin*, and three of the persons beneficially interested in the said property, under the said devise and bequest. The defendant *E. L. Oke*, on the part of himself and his co-trustee *Sarah Bell*, directed *Mr. Young*, an auctioneer, to advertise the property for sale. The property was accordingly advertised for the 27th August, 1830. On the 26th August, a meeting of some of the parties beneficially interested took place, with a view to obviate the difficulty arising from a want of power to sell in the trustees, when the following memorandum was signed and delivered to *Mr. Young*:—‘*Romsey, 26th August, 1830. I hereby authorize you, on the part of myself and my mother, to sell the Star Inn, Southampton, which is advertised to be sold by you on the 27th instant, at and for the sum of 10,000*l.*, but not under. John Bell for Sarah Bell, John Bell, William Bell, Helen Taplin, Julia Shepherd.*’ *John Bell*, who signed the above authority as agent for his mother *Sarah Bell*, and for himself, was one of the parties beneficially interested, and died before the action was brought; *Julia Shepherd* is another of the parties beneficially interested, and is and then was a married woman. And I do at the like request state that the allegations in

the first count of the declaration relating to the particulars of sale, conditions, and contract, were proved before me, by due evidence of the execution by the defendant's attornies, Messrs. *Sharpe* and *Harrison*, (as agents for the vendors), of the contract, to be collected from the particulars, conditions, and contract following, that is to say [here the award set out the contract, &c]." Now, as to the first objection, namely, that too many defendants had been joined in the action, it must be clear, from the facts found by the arbitrator, that with the exception of the two trustees, all the defendants were improperly made parties. With respect to the second objection, namely, that the arbitrator had improperly allowed interest on the two sums retained by Mr. *Morris* and Mr. *King*, the case of *Sweetland v. Smith* (a) was directly in point. There the plaintiff agreed to advance to the defendant a sum of 4000*l.* on mortgage of certain freehold and copyhold premises; and by the agreement it was stipulated, that, within one week from the date of the agreement, the defendant should deliver to the plaintiff or his solicitor a complete abstract of the title of the premises, and produce the title-deeds necessary to verify the same, and deduce and shew a good marketable title within one month after the delivery of the abstract; and it was provided that if the defendant should not within a week deliver such abstract and produce the title-deeds, and within a month after the delivery of the abstract deduce a marketable title, then it was to be at the plaintiff's option to consider the agreement void. It was also provided that the defendant should forthwith pay to the plaintiff all costs and charges incurred by him in investigating the title to the premises. Abstracts of title were delivered soon after the agreement, but which were found to be defective. From the 24th September, 1831, the day when the title ought to have

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(a) 1 C. & M. 585.

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been completed, until the 14th *May*, 1832, negotiations were going on, the plaintiff remonstrating on the badness of the title, and informing the defendant that during the whole interval his money had been lying idle. The defendant during the interval was employed in endeavours to amend his title, until the last-mentioned day, when he failed so to do, and the negotiation ended. The plaintiff afterwards brought an action to recover the amount of costs and charges incurred by him in investigating the title, and also interest on the 4000*l.*, which had been lying idle from the 24th *September* until the 14th *May*. The Court of *Exchequer*, after taking time to consider, was of opinion that the plaintiff was not entitled to recover the interest. The present was like the case of a subcontract entered into hastily by an intended purchaser, and where the vendor could not be liable to the damages resulting from such improper haste. In *Walker v. Moore and Another* (a), the decision was to that effect. There, the plaintiff had contracted with the defendants for the purchase of a real estate; and the vendor, acting *bonâ fide*, delivered an abstract, shewing a good title. The plaintiff, before he examined it with the original deeds, contracted to resell several portions of the property at a considerable profit. Upon a subsequent examination of the abstract with the deeds, the plaintiff discovered that the title was defective, and thereupon the subpurchasers refused to complete their purchases, and he refused to complete his purchase from the defendants, and brought an action, wherein he claimed as damages the expense which he had incurred in the investigation of the title, the profit that would have accrued from the re-sale of the property, the expense attending the re-sale, and the sums which he was liable to pay to the subcontractors for expenses incurred by them in examining the title. The Court there

(a) 10 B. & C. 416; S. C. 5 M. & R.

held that he was entitled to recover only the expenses that he had incurred in the investigation of the title, and nominal damages for the breach of contract, as no fraud could be imputed to the vendor. A preliminary objection might be taken perhaps to the application, that it was too late, the whole of the first term after making the award having elapsed. The present case was not within the statute of 8 & 9 Will. 3, c. 15, s. 2, it being by order of *Nisi Prius*. The application, therefore, to set it aside, should in general be made within the same time as a motion for a new trial. But if a sufficient reason were shewn for the delay, the Court was in the habit of allowing further time to make such a motion. In *Rawsthorn v. Arnold (a)*, Lord *Tenterden* observed, "the party seeking to disturb the decision of the arbitrator should regularly have made his application within the period allowed for moving for a new trial, although the Court might not insist rigidly upon a compliance with that rule, if any sufficient ground were stated for asking indulgence." Here, sufficient grounds certainly existed for inducing the Court to give indulgence to the applicant. A rule *nisi* for setting aside the award was obtained in due time, in the term next after the award was made. That rule was enlarged until the present term, and then that rule was discharged on a purely technical objection, quite unconnected with the merits of the case. Under such circumstances, the Court would surely be of opinion that its indulgence ought to be extended, and therefore, that a rule *nisi* ought to be granted in the present case for setting aside the award.

A rule *nisi* having been granted—

The *Solicitor-General* and *Barstow* shewed cause in the

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first instance. The Court had now no power to grant a rule nisi for setting aside the award. In *Re Helleyer v. Snook* (a), the Court refused to grant a second rule to set aside an award where a rule for that purpose had already been discharged. There, Lord *Ellenborough* said, "If a rule has once been obtained to set aside an award, we must assume that the objections taken on that rule are all that can be taken to the award." From that case, it appeared that the Court could not enter into the question of what the grounds were on which the previous rule had been disposed of. If a different course were pursued, the most mischievous consequences might result. A party might by that means come prepared with fresh materials, which his failure on the previous motion had taught him how to supply. The case of *M'Arthur v. Campbell* (b) was strongly against this application. There it was held, that an award is published when the arbitrator gives the parties notice that it may be had on payment of his charges, whether they are reasonable or not; and, therefore, that the exorbitance of the charges which prevented the party applying from taking up the award, was no excuse for making the application to set it aside after the regular time. Next, with respect to the objections to the award itself, supposing the Court to be of opinion that a rule ought to be granted—The first objection was, that the number of defendants was too great. The facts, however, found by the arbitrator on the face of his award, went clearly to shew that all the persons made defendants were liable to the plaintiff. As to the second objection, viz. the recovery of interest, the case of *Sweetnam v. Smith* was clearly distinguishable from the present. There, a special agreement had been made by the parties as to what should be the consequences resulting from a breach of contract, and the decision there proceeded on the terms of that agreement.

(a) 2 Chit. Rep. 265.

(b) 5 B. & Ad. 518.

Here, no agreement was made, and the parties were entitled to recover that which the law gave them. In *Farquhar v. Farley (a)*, the purchaser of a reversionary interest in Bank stock, upon failure of the vendor to deduce a title, had recovered back the deposit in an action against the auctioneer; and the Court held that the purchaser might nevertheless recover interest on the deposit, in an action against the vendor for not completing his contract, under an averment of special damage in the plaintiff's losing, by reason of the non-performance, the interest and benefit of his money. There the money which was kept idle was the plaintiff's own. Here it was kept idle in the hands of another person, and for its being so kept the plaintiff had to pay. In point of principle, there could be no difference; and the plaintiff therefore would be entitled to recover the amount of money so paid. Various other cases to the same effect were collected in *Sugden's Vendors and Purchasers (b)*.

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PATTESON, J.—In this case a rule *nisi* to set aside an award for matters appearing on the face of it had been obtained by the defendants in proper time. The rule was enlarged last term by consent, when the defendants would have been able, had the rule been then heard and discharged on a preliminary technical objection, to have obtained a fresh rule on correcting the mistake into which they had fallen. In this term, the rule was discharged on such preliminary objections, *vis.* that a copy of the award had not been annexed to the affidavit verifying such copy, and therefore the Court had not the contents of the award before it. A fresh rule *nisi* having been obtained, cause has been shewn in the first instance; and it is objected, *first*, that the Court cannot grant a rule after the end of

(a) 7 Taunt. 592.

(b) Pages 513, 514.

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the term subsequent to the making the award; and, *secondly*, that if it can, yet this is not a case in which the Court will so do. The submission is by order of *Nisi Prius*, a verdict being taken subject to an award; the case therefore is not within the statute 8 & 9 *Will.* 3, c. 11. But it is said, that the Courts have bound themselves to follow the rule established by that statute; and in order to shew this, the case of *M^r Arthur v. Campbell* was much pressed upon the Court. On the other hand, cases were referred to, in which the Court has expressed an opinion, that though the time mentioned in the statute be usually adopted, it is by no means imperative on the Court so to do. I have examined those cases, and am decidedly of opinion, that it is not imperative on the Court, though I think that a very strong case ought to be made out to justify a deviation from the usual course. I am of opinion that such a case is here made out. The rule was originally obtained in due time; the questions on the face of the award had been raised by the arbitrator pursuant to a clause in the submission, compelling him to raise them; the objection to the rule was of the most strictly technical nature, and if taken at the regular time, before the rule was enlarged, could have been cured. I think, therefore, that the Court has power to grant a fresh rule; and, in the exercise of a sound discretion, ought to do so. I forbear at present to say anything as to the questions raised, because I do not think that this properly belongs to the consideration of the preliminary question. The danger of allowing a new motion, where the party or his attorney has made a blunder at first, was much pressed, and I felt the force of the argument: I think it conclusive where the materials are originally defective in substance, but not where there is a mere slip of form. I come now to the award itself. The first objection is, that too many defendants are joined: the arbitrator clearly intended to raise this point; though he has in words found that the con-

tract was signed by the attornies of the defendants as agents for the *defendants*, he has however set out the contract, and it is signed by them as agents for the *vendors*. The question is, are the defendants the vendors? and I think that the arbitrator's expressions are not to be so read as to conclude that very point which he plainly intended to raise. By the facts which he has found, it appears that two of the defendants were trustees, and that the others, being beneficially interested to some extent, signed an authority, that the auctioneer who had been employed by the trustees might sell. I do not think that they thereby became contracting parties or authorized the attornies employed by the trustees to sign any contract as their agent; but that the object and effect of their signature was merely to preclude them from calling in question the fact of the auctioneer being employed by the trustees, leaving them the contracting parties; and I am therefore of opinion that too many defendants were joined, and that a nonsuit ought to be entered. The second objection is, that the arbitrator, under a reference of all matters in difference, has awarded the trustees to pay two sums for interest, which the plaintiff was obliged to pay, in respect of monies kept by other persons idle for his use in the contemplated purchase, and at his desire. There is no doubt, but that the interest of the plaintiff's own money kept unemployed might be given as special damages, if it was provided prematurely, and if it was reasonable to keep it unemployed in expectation of the completion of the contract; and I do not see why a similar view may not be taken as to interest paid by the plaintiff, as monies kept for him by others, if *boná fide* so kept, and under reasonable circumstances. The arbitrator has found that it was *boná fide* kept pending negotiations for removing the defects in the title, and I must take it, as he has not found the contrary, that the time and circumstances were reasonable. This is not the case of a subcontract, as put by one of the learned

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counsel; but the case of a loss sustained by the plaintiff in consequence of measures which he took to enable himself to fulfil the contract of purchase. It is not a case of damages for the loss of a bargain, as that of a subcontract, alluded to in *Walker v. Moore*, in effect was, but damages sustained by the plaintiff, in his attempts to complete the original contract itself. On the whole, therefore, I am of opinion that a nonsuit must be entered, and the latter part of the award against the two trustees stand good.

Rule accordingly.

PHILLIPS v. HAYWARD.

In an action of *detinue* for deeds, the Court will, on delivery up of a portion of them, either stay proceedings or put the plaintiff under terms, if he insists on proceeding, in order to prevent his obtaining an undue advantage.

BARSTOW shewed cause against a rule *nisi*, obtained by *Jervis*, for staying proceedings in the present action, on delivering up to the plaintiff a certain counterpart of a lease mentioned in the rule, and on payment of costs down to the time of such delivery. It was an action of *detinue* for certain deeds of the plaintiff, of which the defendant kept possession; and therefore, the plaintiff was not merely entitled to the deeds themselves, but also to damages for their detention. The plaintiff, therefore, had a right to proceed for the recovery of damages, even though some of the deeds were delivered up. On that right he insisted.

Jervis, contra.—If the opposition to this rule be successful, the defendant will be compelled to go to trial with the certainty of a verdict against him, although he may establish his case on the counts upon the only question in dispute.

PATTESON, J.—In *Tidd's Practice* (a), a manuscript

(a) Vol. 1, p. 545, ed. 9.

case is mentioned, where *trover* was brought by the assignees of a bankrupt for a steam engine &c., and the Court made a special rule for staying the proceedings on delivering to the plaintiffs a part of the goods for which the action was brought, and payment of costs up to that time, provided the plaintiffs would accept thereof in discharge of the action; or otherwise, that the articles delivered should be struck out of the declaration, and the plaintiffs be subject to costs, unless they should obtain a verdict for the remainder of the goods, or prove a deterioration of the part delivered up. On the authority of that case, I think I may interfere in the manner prayed. The rule therefore will be in this form:—That the defendant shall be at liberty to deliver up the deed in question, on payment of costs up to the time of such delivery; and that the proceedings in the action shall be stayed, provided the plaintiff will accept of such discharge of such action; otherwise, such deed is to be struck out of the declaration, and the plaintiff shall be subject to the costs of the action, unless he obtains a verdict for some of the other deeds in the declaration mentioned, or damages, beyond nominal damages, for the detention of the deed in question. The defendant, however, at all events to pay the costs of this application, and not to plead *non detinet* as to the other deeds. As it appears he claims a lien upon them against the plaintiff, he must plead his lien, and so try upon the merits.

Rule accordingly.

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Where an attorney brings several *qui tam* actions, and, after their commencement, makes an offer to the defendant to compromise them, it is no ground for striking him off the roll.

SMITH *qui tam*, &c. v. GILLET.

SMIRKE moved for a rule to shew cause why an attorney of the Court should not be required to answer the matters in the affidavits on which he moved, under these circumstances:—It appeared from the affidavits of the defendant's attorney and his agent that the defendant was the printer and publisher of a newspaper called *The Cornwall Gazette, Falmouth Packet, and Plymouth Journal*. The present and another *qui tam* action were brought for penalties alleged to have been incurred by him with respect to the newspaper above mentioned. The declaration in the first action contained one count, and was for a penalty of 100*l.*, alleged to have been incurred in printing and publishing the said newspaper, not containing on any part of it the true and real name and names and addition of the printer and publisher of the said newspaper, contrary to the form of the statute in such case made and provided; and the declaration in the other action contained one hundred and four counts, for so many distinct penalties of 100*l.* each, of which fifty-two were alleged to have been incurred contrary to the form of the statute, the said newspaper on so many distinct days having been printed at another printing house than that described in the affidavit made by the said defendant, and delivered to an officer appointed by the Commissioners of the Stamp Duties; and the remaining fifty-two penalties were alleged to have been incurred by printing the said newspaper on so many distinct days at another printing house than the printing house described in the said affidavit. The two actions were consolidated by an order of Mr. Justice *Littleale*, dated the 10th *December* last. Since the actions were commenced, it had come to the attorney's knowledge that the plaintiff is, and, as it was believed, at the time of commencing them, was, a clerk of one *Adolphus*

Warren, of *Jewin Court, Jewin Street*, who is the plaintiff's attorney in the above action. The affidavits then went on to state, that some time before the bringing of these actions *Adolphus Warren* had been employed by one *James Williams* to recover possession of certain property in the county of *Cornwall*, to which the latter pretended to have a title; and in the course of such employment, judgments in certain actions of ejectment were irregularly obtained by *Adolphus Warren*. Many paragraphs appeared in the county newspapers on the subject; and, in particular, some purporting to be written by *Adolphus Warren*, were from time to time published in a newspaper called the *Cornubian*, wherein the proceedings connected with such judgments were unfairly and incorrectly stated. A paragraph was inserted in the newspaper of which the defendant was printer and publisher, stating the irregularity of such judgments, and containing also some observations on the conduct of the attorney of *James Williams*. Not long after the publication of that paragraph, *Adolphus Warren* commenced an action, in his own name, against the defendant, for publishing the statement, pretending that it was libellous; and which action is still pending. *Adolphus Warren*, about the 7th *July* last, gave notice directed to the attornies for the defendant. that the Court of *King's Bench* would be moved in the then next *Michaelmas* Term for a rule to shew cause (amongst other things) why they should not severally be struck off the roll of attornies for malpractice; and that such notice was immediately printed and published *verbatim* in the above-mentioned paper, in an article purporting to be sent by the said *Adolphus Warren*. No such motion was, however, as it was believed, ever made in pursuance of the notice, nor has he ever been served with such a rule to shew cause, nor is there any pretence for such motion. The deponent further stated that he verily believed

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that this action was brought, in fact, at the instance and instigation of, and with the privity and for the benefit of, the said *Adolphus Warren* (although in the name of his clerk, *W. S. Smith*), and with a view to gratify a malicious feeling, as well as to make a profit by the proceedings; and that the name of his clerk was used only that the said *Adolphus Warren* might not seem to be personally prominent and moving therein, and that the said *Adolphus Warren*, as the defendant verily believed, is the real and substantial plaintiff.

The affidavit of the agent (Mr. *Charles H. Pearson*) stated, that he and his partner, *William Sandys*, of *Crane Court*, were agents for Messrs. *Grylls & Hill*, the attorneys for the defendant; and that soon after the last day of last *Michaelmas* Term, when it was adjudged by this Court, upon a motion in this action, that penal actions against newspapers on the statute of 38 *Geo. 3*, c. 78, would lie at the suit of a common informer, several other actions upon the same statute were commenced against other newspapers by *Adolphus Warren* in the name of *W. S. Smith*; and that this deponent has already been informed of ten such actions (including the present) for the recovery of penalties amounting together to upwards of 32,000*l.*, in the whole of which actions *Adolphus Warren* was the attorney, and *W. S. Smith*, his clerk, the plaintiff. That *Adolphus Warren* had as well in his own name as by letters purporting to be signed by him, through one *George Bloxland Rogers*, his articulated clerk, made several applications to urge the defendant to compound this action, which he has hitherto refused to do; and that on the 8th of *November* last, being within five days after the delivery of the declaration herein, containing one hundred and four counts, a note was sent to the defendant and his partner in the following words and figures:—" *Smith v. Gillett, Same v. Same. 3, Jewin Court, Jewin Street, City, 8th November, 1834.* Gentlemen, I should be glad to know if the defendant is disposed to settle these actions, in order to save himself costs. I am, gentle-

men, your most obedient servant, *Adolphus Warren*. To Messrs. *Sandys & Co., Crane Court, Fleet Street*." No communications on the subject of these actions had ever been made to the defendant or his attornies by the said *W. S. Smith* directly or in his name, but have always been made, as deponents verily believe, in that of his attorney *Adolphus Warren*. The present application was made with a view ultimately to strike the attorney off the roll. In *The King v. Southerton*(a), it was held, that threatening by letter or otherwise to put in motion a prosecution by a public officer to recover penalties for selling *Fryar's Balsam* without a stamp (which by 42 Geo. 3, c. 56, is prohibited to be vended without a stamped label), for the purpose of obtaining money to stay the prosecution, is not such a threat as a firm and prudent man may not be expected to resist, and therefore is not in itself an indictable offence at common law, although it be alleged that the money was obtained. The defendant there was an attorney. Lord *Ellenborough*, however, afterwards said, "that enough appeared to the Court to satisfy them, that the defendant was a very improper person to remain as an attorney on the rolls of the Court. Therefore, he desired the Master to inquire and report whether the defendant was still upon the roll of attornies of this Court." The Master having certified to the Court in the affirmative, on a subsequent day a rule was made on the defendant to shew cause why he should not be struck off, which the defendant yielded to; and his name was accordingly struck off the roll, his counsel admitting that he could not resist it. The present case, perhaps, did not strictly come within the one cited, for here proceedings had been commenced before any suggestion had been made of a compromise. It was, however, clear that the attorney had acted maliciously and vexatiously; and therefore the Court could say, whether, under such

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(a) 6 East, 126.

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circumstances, the attorney ought to remain longer on the roll.

Cur. adv. vult.

PATTERSON, J.—I have looked into the affidavits, but they do not charge the attorney with endeavouring to extort money by means of threatening to proceed against the defendant. The case is not, therefore, within that of *The King v. Southerton*. I know of no authority for saying, that an attorney ought to be struck off the roll because he has acted as a common informer. He is not excluded by the statutes from acting in that character. If even the actions were vexatiously brought, I do not know that that is a ground for striking him off the roll. If there had been a threat to bring such actions, it would have been different. The rule prayed for, therefore, cannot be granted.

Rule refused.

REX v. STRETCH.

In order to subject a witness to an attachment for not obeying a *subpœna*, it must appear that he was called on it.

KELLY shewed cause against a rule *nisi* obtained by **White** for an attachment against a person named **Joseph Jacobs**, for not appearing on the trial of this prosecution pursuant to a *subpœna*. He objected, *first*, that the affidavits in support of the rule did not state that the witness was material to the question in issue; *secondly*, it was not sworn that he had been called on his *subpœna*; and, *thirdly*, his affidavits disclosed full grounds for excusing the witness from not attending. On the first point, the Court of *Exchequer* had lately determined, that it must appear that the witness's evidence was material before they would grant an attachment for not obeying a *subpœna*.

White, in support of the rule.—As to the first objection, in the case cited from the *Exchequer*, the Court knew from the note of the learned Judge who tried the cause that the evidence must be circumstantial, and that the proceeding was vexatious. With respect to the second objection, he cited *Barrow v. Humphreys* (a). That was an application for an attachment against a witness for not obeying a *subpœna*. There, Mr. Justice *Best* said—"An attachment for contempt proceeds not upon the ground of any damage sustained by an individual, but is instituted to vindicate the dignity of the Court. The calling of the witness upon the *subpœna* is only for the purpose of obtaining clear evidence of his having neglected to appear; but that is not necessary, if it can be clearly shewn by other means that the party has disobeyed the order of the Court." By the affidavits in the present case, it was stated, that the witness had been "duly called." Although the words stating him to have been called on his *subpœna* were not used, yet those which were used were sufficient to shew that he had been called in such a way as to constitute a contempt if he did not appear.

PATTERSON, J.—It certainly does not appear by the affidavit that the witness was called on his *subpœna*. I think that ought to appear, or the party will not be liable to an attachment. Besides that, I think, on the merits disclosed in the affidavits, the party ought to be excused for not attending.

Rule discharged.

(a) 3 B. & Ald. 598.

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"Assessor" is not a good description of a deponent in an affidavit.

If an affidavit be joint, an objection to the description of one of the deponents does not render the statements of the others inadmissible.

If an affidavit purports to be signed by a deponent, it will be no objection that it is signed in a foreign character, and there is no statement in the jurat to shew that the deponent is a foreigner, and that the writing in question is his signature.

A defendant waives an objection of misnomer by taking out a Judge's order wherein he uses the name by which he was arrested.

CHADWICK JONES objected to an affidavit used by **Channell**, on shewing cause against a rule for discharging a defendant out of custody, on the ground of misnomer. The affidavit was sworn jointly by several deponents. One of them was described as "assessor." That, he submitted, was not a sufficient description of the deponent.

PATTESON, J.—The word "assessor" is not a sufficient description of the deponent. Though the affidavit is joint, the misdescription of one deponent only renders his part of the affidavit objectionable. The statements of the other deponents are still admissible.

Chadwick Jones then objected that the signature of another of the deponents was not in *English* characters, but in the characters of some foreign language. It should be shewn, therefore, by some affidavit, or by the jurat, that the party was a foreigner, and that the signature was his.

PATTESON, J.—It is not the *English* character, but it is not a mark; and it purports, from its position, to be the signature of the person making the affidavit. I must therefore presume that the person who made those letters was able to read the affidavit, although the language in which it was written was different from his own.

Channell then proceeded to shew cause against the rule. He objected, that the defendant had waived the objection to the misnomer by the course which he had pursued. The defendant had taken out an order in this cause before a Judge, in which he had called himself by the same name as that by which he had been arrested. This, he submitted, was a waiver of the objection; and he cited *Finch v.*

Cocker (a), where the Court of *Exchequer* held, that the affidavit in support of a rule to set aside a bail-bond, on the ground of a mistake in the defendant's surname, must be intitled in the right name of the party, and not in the name by which he was arrested. He having entitled his affidavit in the name which he alleged to be wrong, must be taken to have admitted that he was as well known by the one name as the other. So here, having taken out an order in which he called himself by the name supposed to be a wrong one, he had admitted that he was as well known by the one name as the other.

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NATHAN
v.
COHEN.

PATTESON, J.—After an order having been taken out in this case, wherein the defendant called himself by the same name as that by which he has been sued, I cannot interfere as required. I must take it, from the course which he has pursued, that he was as well known by one name as the other.

Rule discharged without costs.

(a) Ante, Vol. 2, p. 383.

Ex parte BRIDGMAN.

CHADWICK JONES moved to re-admit an attorney.—His affidavit did not state that notice of the intention to make the application had been given to the *Stamp Office*.

An attorney cannot be re-admitted without depositing to his having given notice to the *Stamp Office* of his intention to apply for re-admission.

PATTESON, J.—Unless you have an affidavit that such notice has been given, the application cannot be entertained.

Chadwick Jones then prayed for leave to amend his affidavit, the notice having in fact been duly given.

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Ex parte
BRIDGMAN.

PATTESON, J., assented. And the amendment having been made—

Rule accordingly.

Wade v. St. L. & N. O. R. Co. 28 L. J. Q. B. 48.

SEELY v. POWERS.

If a Judge, of his own authority, discharges a jury from giving a verdict, on the ground of their not being able to agree, the party ultimately successful will not be entitled to the costs of the first attempt at trial.

MARTIN applied for a rule *nisi* to review the Master's taxation. The facts were these:—The cause was tried before Mr. Justice *Littledale*; and the jury, after retiring, remained out all night. The next morning, being still unable to agree, the learned Judge, by his own authority, discharged them. Subsequently the parties again came down to trial, and the plaintiff had a verdict. On taxation, the Master refused to allow the costs of the first trial; and it was now sought to review that taxation. He contended that the Master was wrong in the view which he had taken. He cited the case of *Harrison v. Bennett* (a), where, during the trial of the cause, one of the jury absconded, and the other jurors were accordingly discharged, the plaintiff refusing to take a verdict from the eleven. The cause was again tried, and the plaintiff obtained a verdict. The Court of *Exchequer* there held that the plaintiff was entitled to the costs of both trials. Again, in *Burchall v. Ballamy* (b), the Court directed, "that, for the future, in all cases where a cause goes down to trial, and goes off upon any occasion, without the fault, contrivance, or management of the parties, and is afterwards brought down again to trial, the costs of such former abortive going down to trial shall be taxed and allowed to the party finally prevailing, in the same manner as if the cause had gone off upon a *remanet*." This case was like that of a *remanet*, where the party ultimately successful is entitled

(a) Ante, Vol. 1, p. 627.

(b) 5 Burr. 2694.

to be indemnified for his expenses attending the first assizes or sittings.

A rule nisi having been granted—

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 SERLY
 v.
 POWERS.

Henderson shewed cause in the first instance.—There is a distinction where the delay is the act of the Court, as it is here, and the act of the jury. The successful party is not entitled to his costs where there has been an ineffectual trial; as, for instance, where the jury is discharged without their giving a verdict. In *Vallance v. Adams* (a), which was an action of trespass, the jury found for the defendant upon a plea which went to the whole cause of action, and the Judge thereupon discharged them as to the other issues. The Court there held, that the defendant was not entitled to the costs of the pleadings or witnesses in respect of the issues upon which no verdict was given. There Mr. Baron *Bayley* said—"You have all the costs on the issues found for you; you are not entitled to the costs of the issues not found for you. Those counts on which there is no finding, either one way or the other, do not come within the general costs; neither are you entitled to the expenses of the witnesses who were taken down to speak to the issues on which no verdict was given, for the verdict might have been against you." The language of the 1 *Reg. Gen. H. T. 2 Will. 4*, s. 64 (b), was in furtherance of this view. The words were—"If a new trial be granted without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed on the second." Again, there could not be any distinction in practice between the case of withdrawing a juror and discharging a jury without giving a verdict. In *Everett v. Youells* (c), the Court held, that discharging a jury by consent does not termi-

(a) Ante, Vol. 2, p. 118.

(b) Ante, Vol. 1, p. 191.

(c) 3 B. & Adol. 349.

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nate the suit, but is the same in this respect as withdrawing a juror. The case might also be likened to that of a *venire de novo*. In *Lickbarrow v. Mason* (a), the Court decided that where a *venire de novo* is awarded, the party succeeding is only entitled to the costs of the second trial. In *Bird v. Appleton* (b), after a *venire de novo* awarded on an imperfect special verdict, and a new trial granted after a verdict for the plaintiff on the second trial, and the jury found again for the plaintiff on the third trial, the Court held that he was only entitled to the costs of the last trial, unless it be otherwise expressed in granting the new trial. Admitting the rule in *Burrows* to be correct, the present case must be treated like one in which the parties had consented to withdraw a juror. In *Body v. Esdaile* (c), where there were three verdicts, the first in favour of the plaintiff, the second in favour of the defendant by reason of a misdirection, and the third in favour of the defendant on the merits, and the rule for the first trial reserved the consideration of the costs, the Court allowed the defendant to take the costs of the first or second at his option, and the costs of the third. In *Stodhart v. Johnson* (d), it was decided, that if a defendant pays money into Court, and the plaintiff proceeds to trial, when a juror is withdrawn, the plaintiff is not entitled to the costs up to the time of paying money into Court.

Martin, in reply, contended, that, as in the present case the jury had been discharged by the authority of the Judge, and not by the consent of the parties, it was distinguishable from any of those cited.

PATTESON, J.—As there does not appear to be any case

(a) 6 T. R. 131.

(b) 1 East, 111.

(c) 3 Bing. 174.

(d) 3 T. R. 657.

exactly in point, and as there is some nicety in the question, I must take time to look into the authorities.

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Cur. adv. vult.

PATTESON, J.—In this case, the jury having been out all night, and not agreeing, the Judge in the morning discharged them of his own proper authority. Afterwards, the cause was tried, and the plaintiff succeeded. The Master, on the taxation of costs, has rejected those of the first trial. This rule calls for a review of such taxation. On the one hand, the case is likened to that of a *remanet*, in which the costs of the first attendance are always allowed; and *Harrison v. Bennett* was relied on, where a juror having absconded, and the Judge having discharged the rest, the Court held, that the plaintiff, having succeeded on a second trial, was entitled to the costs of the first. On the other hand, the case is likened to one of a juror withdrawn by consent, where neither party has costs. That, it is answered, is matter of agreement; and as the consent or agreement is silent as to costs, none are allowed. I cannot, however, see any difference in reason between the withdrawing a juror by agreement and the discharge of the jury by the Judge. In either case it is done because the jury cannot agree. In the case of a *remanet*, there is no reason to suppose that the jury at the first trial would have disagreed. *Harrison v. Bennett* may be distinguished, because the first jury as well as the second there found for the plaintiff. I find it laid down in *Burchall v. Ballamy* (a), that the rule as to *remanets* is to be extended to similar cases; and, accordingly, where a cause goes off for defect of jurors, the costs are allowed to the party who ultimately succeeds. In this Court, where a new trial is granted without mention of costs,

(a) 5 Burr. 2693.

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those of the first trial are not allowed, though the same party succeeds on the second. This, however, may be because the Court are dissatisfied with the first verdict, and yet the second may be quite right, from additional evidence or other causes. Here there is no fault on either side, nor any thing with which the Court is dissatisfied, but a mere accident in the cause, by which the first attempt at trial is rendered abortive. *Non constat* which way the first jury would have determined. Upon the whole, therefore, I am of opinion that this case must follow the practice in cases of a juror being withdrawn, and that the rule must be discharged.

Rule discharged.

COURT OF COMMON PLEAS.

Hilary Term,

IN THE FIFTH YEAR OF THE REIGN OF WILLIAM IV.

DABBS v. HUMPHRIES.

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THE facts of the case were these:—The sheriff of *Sussex* having, on the 25th *February* last, seized certain goods, on behalf of a judgment creditor, which were claimed by two persons, named *Firminger* and *Aylmore*, he on the 3rd *May* brought the parties before the Court under the Interpleader Act; and it was decided that an issue should be tried between the original plaintiff *Dabbs* and the claimants. Subsequently, however, *Dabbs*, finding that the goods really did belong to *Firminger* and *Aylmore*, abandoned all claim to them, and declined to try the issue. The sheriff had in the mean time (on the 23rd *May*) sold the goods. Mr. Justice *Gaselee*, at chambers, having by consent made an order for that purpose, the sheriff satisfied the claim of *Aylmore*, which was of trifling amount, and directed the remainder of the money to be handed over to *Firminger*, short 11*l.* 6*s.* which he ordered to be retained by the officer of the Court, to abide the result of an application to be made to the Court by the sheriff for his expenses. The sheriff accordingly afterwards applied to the Court for a rule, calling upon *Dabbs* and *Firminger* to shew cause why they should not pay him for the expenses of his keeping

The Court will allow the sheriff who applies for relief under the Interpleader Act, such expenses as he may incur as agent of the parties after his application.

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possession from the 25th *February* to the 23rd *May*, and the expenses of the sale.

Bompas, Serjt., now appeared to shew cause for *Firminger*, and contended, that he was entitled to have the 11*l.* 6*s.* paid out to him, as the money was the produce of goods of his, which it was now acknowledged had been wrongfully seized. Before the passing of the Interpleader Act, *Firminger* would have been entitled to recover the entire value of the goods in an action of *trover*, or full damages in an action of *trespass*; and the least that could now be done was to give him the produce of his goods, and his costs of coming into Court to obtain it.

Barstow shewed cause for *Dabbs*, the judgment creditor. *Dabbs* had done nothing whatever which should occasion his being made to pay the sheriff's costs. It had been settled, that the sheriff could not have the costs of his application under the Interpleader Act (*a*). Even where he was placed between two parties, the one urging him to execution, and the claimant refusing him indemnity, it was doubtful whether he could have costs; but certainly he could not in a case like the present, where the execution creditor had merely put the writ into his hands, to do with it as his duty required, and had not urged him on in any way whatever. And when he himself became a party, he declined to press his claim, as soon as he discovered that *Firminger* had a better one.

Clarkson, for the sheriff, urged the hardship of the case, and relied upon *Bryant v. Ikey* (*b*), as affording a precedent for a sheriff receiving costs, in an application under the Interpleader Act.

(*a*) See *Field v. Cope*, ante, Vol. 1, p. 567; *S. C. 2 C. & J.* 480, and 2 Tyr. 458; *Barker v. Dynes*, ante, Vol. 1, p. 169; *Morland v. Chitty*, ante, Vol. 1, p. 520; *Seward v. Williams*, ante, Vol. 1, p. 528; *Bowdler v. Smith*, ante, Vol. 1, p. 417.

(*b*) Ante, Vol. 1, p. 428.

TINDAL, C. J.—I think the rule should be absolute, as far as relates to the costs of the sheriff's being in possession between the time of the application to the Court and the time of the sale, also as far as relates to the costs of the sale and of this application. The question is as to who shall pay these costs. I think they should be paid by the plaintiff in this action. *Firminger* is a party whose goods have been wrongfully taken, and he had a right of action against the sheriff and judgment creditor, for the full value of the goods sold. Every step taken since that wrongful act was committed against him has been for the benefit of the wrong doers. *Firminger*, therefore, must be borne harmless. I cannot say, upon the affidavits, that the sheriff was a wrong doer between the first taking and the application to the Court; but it is clear, that after that application he became the agent of the judgment creditor, *Dabbs*, whose agent he was also in the sale of the goods. *Dabbs*, therefore, must pay the sheriff the expense of remaining in possession from the 3rd to the 23rd of May, the expenses of the sale, and of this application. *Firminger*, on the other hand, will receive the 11*l.* 6*s.* in Court, and his costs of appearing here from the sheriff, who must receive them from *Dabbs*.

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 DABBS
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PARK, J., VAUGHAN, J., and BOSANQUET, J., concurring,

Rule accordingly.

DOE d. WILSON v. SMITH.

ANDREWS, Serjt., moved for judgment against the casual ejector. His affidavit stated, that the declaration

The Court will not allow a wife's declarations with respect to her

husband being out of the way, to avoid being arrested or annoyed, to be used for the purpose of obtaining judgment against the casual ejector.

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WILSON
v.
SMITH.

was served on the son of the tenant in possession, and that afterwards, when the party who served it called to know if he had received it, his wife told him that she had taken care he should not be in the way to be arrested, or otherwise annoyed.

Per Curiam.—That will not do. Service on the son is not sufficient; and you cannot make the wife a witness against her husband.

Andrews, Serjt., took nothing by his motion.

DOE d. TIBBS v. ROE.

Service of a declaration in ejectment upon the sister of the tenant in possession, who says that she receives it on behalf of her sister, will not be good unless agency be shewn.

BOMPAS, Serjt., moved for judgment against the casual ejector. The declaration had been delivered to the sister of the tenant, who said she would accept it on behalf of her sister.

Per Curiam.—Did the sister authorize her to receive it?

Bompas, Serjt., urged that it was impossible for them to shew that the tenant authorized her sister to act for her, without calling her before the Court. It could only be inferred at present, that the sister who received the declaration was the agent of the tenant; but if the Court would grant a rule to shew cause, it would put it upon her conscience, to say whether such authority was given her sister.

Per Curiam.—What the sister said does not carry the case a step further than if you had served the declaration upon her, unless you also shew an authority in her from the tenant to act for her on other occasions.

Bompas, Serjt., took nothing by his motion.

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PHILIPS v. BARLOW and Another.

THIS was an action on a bail-bond, tried before *Vaughan, J.*, on *Friday, 16th January*, when a verdict was found for the plaintiff.

It is not necessary that the assignment of a bail-bond by the sheriff under the 4th *Anne*, c. 16, s. 20, should be attested by the two witnesses, in whose presence it must be made at the time of the assignment.

Martin applied for a rule, calling upon the plaintiff to shew cause why the verdict should not be set aside and a new trial had. The action was brought by the assignee of the bail-bond, and the plea was that the bond had not been duly assigned to the plaintiff: on this, issue was taken. It was proved at the trial, that the assignment was executed by the under-sheriff, in the presence of two witnesses, but one of them only attested it at the time. The other did not sign his name to it until after the action had been brought; and the question was, whether this was a sufficient assignment under the statute. By the 4 *Anne*, c. 16, s. 20, it was enacted, that the sheriff or other officer taking bail, "at the request and costs of the plaintiff in such action or suit, or his lawful attorney, shall assign to the plaintiff in such action the bail-bond, or other security taken from such bail, by indorsing the same, and attesting it under his hand and seal, in the presence of two or more credible witnesses." There was no case upon the point; but as the defendants were anxious to have the opinion of the Court upon it, he had to submit that it was essential the witnesses should both subscribe their names at the time of the execution of the assignment.

TINDAL, C. J.—All that is required by the statute is, that the sheriff shall assign the bail-bond to the plaintiff, by indorsing it, and attesting it by his hand and seal, in the presence of two or more credible witnesses; and that has been done. Where the legislature has intended that

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the witnesses should put their hands to an instrument at the time of its execution, it has found apt words to express that intention; as in the 5th section of the Statute of Frauds, passed only twenty-seven years before this statute of *Anne*.

PARK, J., VAUGHAN, J., and BOSANQUET, J., concurred.

Rule refused.

*See Lindsay v. Bradwell. 5 C. B. 578.
Smith v. Marack. 6 C. B. 466.*

PRINCE v. BRUNATT.

Reported also. 1. Inst. 362. 1. Bng. N. C. 365.

Where, in an action on a bill of exchange by an indorsee, it is pleaded by the acceptor that the drawer is a married woman, the plaintiff may shew in his replication that she drew and indorsed the bill with the authority of her husband, without its being deemed a departure.

ASSUMPSIT on a bill of exchange by an indorsee against the acceptor. The declaration stated the bill to be drawn by *Sarah Ellwood* on the defendant, payable to the order of *Sarah Ellwood*, and accepted by the defendant; adding, in the usual way, that it was indorsed to the plaintiff. Plea—that *Sarah Ellwood*, the supposed drawer of the bill, at the time of the drawing and indorsing of the same, was wife of and married to a person of the name of *Thomas Ellwood*, who at the time of the commencement of this suit was and still is living. Replication—that *Sarah Ellwood*, at the time of the drawing and indorsing of the bill, drew and indorsed it, as agent of and by the authority of the said *Thomas Ellwood*, her husband. Demurrer on the ground of departure from the declaration.

Talfourd, Serjt., in support of the demurrer. Upon the authority of the case of *Barlow v. Bishop* (a), it might be contended, that a married woman could not by her indorsement transfer the property of a note; but that case does not stand alone. It was followed by that of

(a) 1 East, 432.

Cotes v. Davis (a), in which it was ruled by Lord *Ellenborough*, that a promissory note having been indorsed to the plaintiff by a married woman, for value, and afterwards an express promise made by the maker to pay it, it might be presumed against him, that the woman had authority from her husband to indorse the note. In that case, there was an express promise on the part of the husband. The latest case bearing upon the point is that of *Prestwick v. Marshall* (b), in which it was held, that the indorsee might recover against the acceptor of a bill of exchange, drawn and indorsed by a married woman with the consent of her husband. But that case rested upon special circumstances, which are not stated in any of the reports. From the original declaration it clearly appeared what was the ground of the decision there. The first count was open to the same objection as was raised in the present case; but the second count stated the contract as it ought to have been stated here. It stated, that *J. B.*, (the husband), by *L. B.* (the wife and drawer and indorser of the bill), his servant and agent in that behalf duly authorized, on such a day did do so and so. Now, if such a count as that had been in the declaration in this case, there would have been no ground for the present objection. But, as the matter stands, the contract set up in the replication is different from that stated in the declaration.

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Comyn, in support of the replication.—It is no departure from the contract set forth in the declaration, but is perfectly good. *Prima facie*, a bill drawn by *Sarah Ellwood*, and accepted by the drawer, is a good bill. The defendant must know the situation of the drawer, but he nevertheless accepts it, and sends it into the world with

(a) 1 Camp. 485.

(b) 7 Bing. 565; *S. C.* 5 M. & P. 513; 4 C. & P. 594.

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the credit of his name. He is, therefore, estopped from telling an innocent indorsee that he cannot recover against him the acceptor, because the drawer is a married woman. *Cotes v. Davis* (a) is in the plaintiff's favour, as well as *Prestwick v. Marshall* (b), for no such distinction, as has been drawn, is to be found in the judgments delivered upon that case. Whether the circumstance of there being a second count, stating the bill to have been drawn by the wife as agent of the husband, was there pressed upon the Court, is of no consequence, for the decision of the Court was upon the general principle. The present case is within the general principle. The plaintiff knowing nothing about the drawer of the bill as a married woman, declares against the acceptor in the usual way. The defendant knows that she is married, and pleads the fact. The replication then states, that her husband permitted her to draw and indorse the bill in the manner stated in the declaration. What is that manner? In the name of *Sarah Ellwood*. The replication, therefore, is no departure from the declaration. The defendant pleads something *dehors* the bill, and the plaintiff answers it.

Talfourd, Serjt., replied.

TINDAL, C. J.—The replication is demurred to, on the ground of its being a departure from the allegations in the declaration. Certainly, where a replication does not fortify and support the charge laid in the declaration, it is what is called a departure, and puts the plaintiff out of court. The question is, whether the matter disclosed in the replication sets up a title inconsistent with that set out in the declaration? I do not think it does. The declar-

(a) 1 Camp. 485.

(b) 7 Bing. 565; 5 M. & P. 513; and 4 C. & P. 594.

ation alleges a derivative title through *Sarah Ellwood*, and the replication carries this on. The defendant would be estopped in objecting that she had no authority to *draw*; but it is incumbent on the plaintiff to shew a distinct authority in her to *indorse* the bill. Accordingly the replication stated, that she had from her husband authority to indorse it in the manner stated in the declaration; that is, in her own name. It is in that point that this case differs from that of *Barlow v. Bishop* (a). On the other hand, *Cotes v. Davis* (b) comprises the facts we have before us, the decision in which is confirmed by *Prestwick v. Marshall* (c), where the judgment was given on the principle, and not upon the distinction adverted to at the bar.

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PARK, J.—I own that I was at first struck with the notion of this replication being a departure; for all the statements about the drawer being a married woman which now arise on the pleadings would heretofore have been given in evidence under the general issue. Now the only distinction between this case and that of *Cotes v. Davis*, which although only a *Nisi Prius* case was decided by a very able judge, is that the maker of the note afterwards made a promise to pay it; but in *Prestwick v. Marshall*, although there was a subsequent promise, Lord *Ellenborough* decided the question entirely upon the ground of a presumed authority in the husband. Judgment must be for the plaintiff.

VAUGHAN, J.—We cannot give judgment for the defendant, without coming into direct conflict with a case recently decided in this Court. If the case had gone to trial with a plea of the general issue, under the old rules of pleading, and the facts here alleged had been established, the plaintiff must have recovered.

(a) 1 East, 432.

(b) 1 Camp. 485.

(c) 7 Bing. 565; 5 M. & P. 513;
and 4 C. & P. 594.

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BOSANQUET, J.—It was not the object of the new rules of pleading to require any alteration in the declaration. If, therefore, the plaintiff would heretofore have been entitled to give evidence, that the drawer of the bill drew and indorsed it with the assent of her husband, he has now a right to place that fact upon the record. The case of *Cotes v. Davis* (a) is expressly in point.

Judgment for the plaintiff.

(a) 1 Camp. 485.

BROWN and Others, Executors of CLARK, v. CROLEY
 and SHARMAN.

An executor plaintiff who loses his cause is not, under the 3 & 4 Will 4, c. 42, s. 31, exempted from the payment of costs unless *mala fides* appears on the part of the defendant—*Vaughan, J., dissentiente.*

THIS was an action by executors against the defendants, for work and labour done, and carts lent for hire, by the testator, a waggon owner. The sum claimed was 900*l.*, which appeared upon the books of the testator to be owing to the deceased; and which a book-keeper, who had been in his service for many years, avowed were correct. In the books, however, there was a blank left for the charge of a cart and three horses for a certain period. The defendants admitted 500*l.* to be due, and paid that sum into Court; but refused to give the plaintiffs any information as to how they made out the reduction. At the trial, they produced a witness, who proved that the testator had agreed that the cart with three horses should only be charged for at the rate of two horses, and also other witnesses, to shew that the charge made by the plaintiffs for that cart were excessive. A verdict was found for the defendants. A rule having been obtained calling upon the defendants to shew cause why the plaintiffs should

not be exempted¹ from the payment of costs, under 3 & 4 Will. 4, c. 42, s. 31—

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v.
CROLEY.

Wilde, Serjt., was proceeding to shew cause; but the Court called upon the counsel for the plaintiffs to support it.

Atcherley, Serjt., and *Hayes*, in support of the rule.—The late act of Parliament has certainly thrown the burden upon the plaintiff. In the case of *Wilkinson v. Edwards* (a), the Court proceeded upon the supposition, that the 3 & 4 Will. 4, c. 42, s. 31, was intended to remedy an omission of the statute 23 Hen. 8, c. 15, s. 1; and that it was in consequence of an accidental omission in the act of *Henry* that executor plaintiffs had not heretofore paid costs when they failed; but there are several cases in which a different reason is given for executor plaintiffs not paying costs. In *Hayworth v. David* (b), the Court said the plaintiff should not pay costs, because he was suing “in another’s right, and for a matter which lay not in his conscience;” and in *Bull v. Palmer* (c), a similar opinion was expressed (d). On this principle, therefore, it is contended, that the plaintiffs are entitled to exemption from the payment of costs. Further, it was a duty of his office to bring this action: for had he not done so upon the information he received, he would have been guilty of a *devastavit*. The object of the recent act was, not to make the executor the insurer of the Court, but to prevent him from bringing actions upon light or no grounds. It was upon this principle that the Court acted in the case decided last term.

(a) Ante, p. 137.

(b) Cr. Jac. 229.

(c) T. Jones, 47.

(d) In *Portman v. Came*, Strange, 682, it is admitted in the argument by implication that the prin-

ciple on which an executor plaintiff was exempted from the payment of costs was, that the cause of action was not within his knowledge.

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TINDAL, C. J.—This question comes before us on the construction of the 3 & 4 *Will.* 4, c. 42, s. 31, which directs, that in every action brought by an executor or administrator, in right of his testator or intestate, such executor or administrator shall, unless the Court otherwise order, be liable to pay costs to the defendant. It appears, therefore, to be the general rule, that he shall pay costs, and that their nonpayment is to be an exception judged of by our discretion. It is very well known, that, before this statute passed, executors and administrators who brought actions in right of their testator or intestate, were not liable to pay costs. I have always understood, that that exemption rested on the peculiar form of the statute that gave the defendant costs, which did not include parties suing not on their own personal contract. Certainly, that is not a new construction of the act in question; for Lord *Eldon* says, in *Tattersall v. Groote* (a), “attending to the language of that act,” the 23 *Henry* 8, c. 15, “perhaps we may be authorized to say, that the sound principle on which the exemption of the executors and administrators rests, is not the degree of ignorance under which they may be supposed to lie, but that the exemption founds itself on the description of the actions contained in the statute, in which costs are to be paid (b).” No doubt cases may be found of an earlier date, in which judges entertained a different opinion; but the opinion we expressed last term is not new. It is not necessary, however, accurately to determine the original ground on which the exemption of executors from the payment of costs rested. This latter statute corrects a grievance, which was left unredressed by the former; for it is scarcely reasonable to distinguish an executor from an ordinary person. After a verdict has been found for a

(a) 2 Bos. & Pull. 255.

(b) The same reason is given by Blackstone, Vol. 3, p. 400.

defendant, he is as much innocent, if sued by an executor, as if he were sued by any other person. *Victus victori in expensis condemnandus est.* Why, then, should not a defendant be re-imbursed his costs in this case? There is a class of cases in which it may be right to give an executor plaintiff, who has been defeated, exemption from the payment of costs. Such as where a defendant has in his possession a receipt from the testator, and keeps it in his pocket; or where the plaintiff is deceived, not simply by a want of clearness in the accounts of the testator, but by something done on the other side to draw him on. If any thing of that kind appeared here, we might decide for the plaintiff; but I do not think there does. The action was brought on what was supposed to be a contract for the annual hiring of a waggon and three horses, and a cart with two horses. There was besides a large demand for job-work. But the executors gave no evidence of any contract; and if they had questioned their own clerk more closely, he might have told them, that so far from there being an annual contract, there was a blank in the books for three years as to any sum agreed upon. To prove the *quantum meruit*, they only produced one witness, besides the servants of the plaintiff; so that they came into Court without having sufficiently investigated that point either. Very likely they relied upon being able to prove their case; but the question is, whether there has been any thing done on the other side that should deprive the defendant of the benefit the legislature intended to give him. The defendant refused to disclose upon what he relied to reduce the plaintiff's demand; but I should be sorry to say, that a defendant is bound to make his defence public, unless it be of the nature I have adverted to. I know of no principle in law, on which a defendant should be compelled to open his proofs to the adverse party. The case, however, does not rest here; for there was evidence of a

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custom in the trade for waggon lenders to send additional horses, in order to help those charged for. On the whole, therefore, I think it will be a wise exercise of our discretion, to leave the executors in this case, who have failed in their action, in the same situation as any other plaintiffs.

PARK, J.—I have had no doubt upon the point from the beginning. The plaintiffs may have intended to act rightly for the benefit of the estate, but having failed, they must pay the costs; and they would have to pay them *bonis propriis*, if the testator's estate were not sufficient, which, however, it will here be. The question is, whether the defendants have done any thing that should make them forfeit their right to costs given them by the recent statute. I do not think that they have; for defendants cannot be compelled to disclose their cases. Applications are constantly made to us at chambers for the purpose, and as constantly refused. The rule must be discharged.

VAUGHAN, J.—It is always with regret that I differ from my learned colleagues; but as I do so on the present occasion, I feel bound to state the reasons on which I have formed my judgment. My Lord Chief Justice has correctly stated, that the true ground on which executor plaintiffs have been hitherto exempt from costs is, the construction put upon the statute of *Henry 8*; but we read in many cases, that the exemption was made, because executor plaintiffs cannot generally know the precise nature of the contract entered into by the testator. That privilege having been abated, the legislature has passed an act, wisely leaving it to the discretion of the Judges to say, whether, under the circumstances of each case, an executor plaintiff losing his cause shall or shall not be allowed his costs. But it is thrown upon the plaintiff to show that he was placed in circumstances that justified him in commencing his action. The question,

therefore, that first suggests itself to my mind in this case is, whether the plaintiffs, using reasonable care and caution, had or had not the duty thrown upon them of presenting the case to a jury. If it was, then, in my opinion, they ought to be protected from costs; for what otherwise will be the situation of an executor? Is he to be placed in a situation which will make him liable to pay the costs out of his own pocket, if the estate be insufficient to meet them? It has been said, that the defendant should not be called upon to disclose his case; but I think this one of the occasions on which he should have disclosed his case. The plaintiffs do not know the contract, but finding a charge against the defendants in their testator's books, may they not reasonably ask the defendants what explanation they can give of the account? I do not complain of the defendants not giving the explanation, but they could not justly complain if the Court afterwards made them pay the costs which their silence caused the plaintiffs to incur. Now, looking at the accounts of the testator in this action, there is a *prima facie* case for the plaintiffs; and I do not see how the matter could have been satisfactorily settled without an appeal to a jury; and the plaintiffs would at all events have been entitled to a verdict for something, if it had not been for the special contract proved by the defendants. Happily this will be no rule for future cases, because each must depend upon its own circumstances. The case decided last term has no resemblance to this. In my opinion, the legislature intended to exempt an executor from the payment of costs, on the Court being satisfied that it was his duty to prosecute the action.

BOSANQUET, J.—I agree in the view taken of this case by the Lord Chief Justice and my Brother *Park*. According to the act of Parliament, an executor is placed in the same situation as every other plaintiff, unless the Court sees cause to except him. It is incumbent upon the

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plaintiff, therefore, to make out a case of exception. It is not sufficient that he should have acted *bona fide*. If it were so, the words of the act of Parliament would be negatory. The act says, that an executor should generally be liable to costs, but that the Court may make an exception. Now, if *bona fides* were sufficient to entitle the plaintiff to be excepted, the law ought to have been left as it was, but giving the Court power to visit him with costs if the action were brought without *bona fides*. What are the circumstances of this case? The defendants are applied to, to state what objection they have to paying the plaintiffs 900*l*. They refuse to state their objection, but state precisely the sum they admit to be due. They do not say, "We will defend this action, and you may get what you can;" but they pay a sum of money into Court, and, in the result, that is proved to be the correct sum. The defendants relied upon the evidence of their clerk to explain the blanks left in the testator's books, and I cannot say that the defendants' attorney was wrong in refusing to disclose that such was the nature of his evidence. The conduct of the defendants, therefore, having been correct, I do not see why they should not have their costs.

Rule discharged.

BRAMAN and Another v. BAKER and Others.

When an acceptor to an action on a bill of exchange by an indorsee, pleads want of consideration and fraud, the plaintiff need not, in his replication, state the consideration at length.

Semble, that it would be sufficient simply to negative the fraud, and allege consideration without stating its nature.

ASSUMPSIT on a bill of exchange, by indorsees against acceptors. The declaration stated, that, whereas "one *William Clare*, on the 22d day of *October*, in the year of our Lord 1833, made his bill of exchange in writing, and thereby required the defendants to pay to the order of him

the said *W. Clare* 500*l.*, three months after the date thereof, which period is now elapsed, and the defendants then accepted the said bill, and the said *W. Clare* then indorsed the same to the plaintiffs, of all which the defendants then had due notice, and then promised the plaintiffs to pay them the amount thereof, according to the tenor and effect thereof, and of their, the defendants', said acceptance thereof. And whereas, also, the defendants, on the 24th day of *February*, in the year of our Lord 1834, were indebted to the plaintiffs in 100*l.* for interest due from the said defendants to the plaintiffs for having forborne and given day of payment of money due from the defendants to the plaintiffs, at the request of the defendants; and in 600*l.*, for money found to be due from the defendants to the plaintiffs, on an account then and there stated between them. And whereas the defendants afterwards (to wit), on the day and year last aforesaid, in consideration of the premises, respectively then promised to pay the said last-mentioned several monies respectively to the plaintiffs on request, yet they have disregarded their promises, and have not, nor have any, nor hath either of them paid any of the said monies, or any part thereof, to the damage of the plaintiffs of 600*l.*; and thereupon they bring their suit," &c.

On the first plea, nothing turned; the second and third were as follows:—"The defendants, as to the breach of the said supposed promise in the said first count of the said declaration mentioned, say, that there was not at any time any consideration or value for the defendants' accepting the said bill of exchange in the said first count mentioned, or paying the amount thereof, or any part thereof; and that the said bill, indorsed by the said *W. Clare*, was afterwards, to wit, on the 4th day of *January*, in the year of our Lord 1834, delivered, on behalf of the defendants, to *Thomas Hunt*, for a special purpose only, to wit, that the said *Thomas Hunt* should keep and take care of

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the said bill of exchange, for and on behalf of the said defendants, and for their use and benefit, and not for the purpose of being negotiated or delivered over by him to any other person whatsoever; and the said *Thomas Hunt* then took and received, and from thence until the said plaintiffs became possessed of the same, as hereinafter mentioned; held the said bill for the special purpose aforesaid; and that the said *Thomas Hunt*, in violation of good faith, and contrary to the said special purpose for which he so received and held the said bill as aforesaid, heretofore, and whilst he held and had the same in his possession, for the special purpose aforesaid, to wit, on the day and year last aforesaid, fraudulently and without the authority of defendants, and with the intent to defraud the said defendants in the introductory part of the first plea named, negotiated and parted with the said bill for his own use and benefit, and then delivered the said bill of exchange, so indorsed as aforesaid, to the said plaintiffs; and that the said bill of exchange was not at any time indorsed to the said plaintiffs otherwise than by the said *Thomas Hunt's* so delivering the same so indorsed by the said *William Clare* as aforesaid to the said plaintiffs; and that the said plaintiffs, at the time when the said bill of exchange was so delivered to them as aforesaid by the said *Thomas Hunt* as aforesaid, had notice of the premises, and well knew that the said *Thomas Hunt* had no power or authority to negotiate or part with the same on his own account, and that there was not at any time any consideration or value given, in good faith, for the said indorsement of the said bill of exchange to the said plaintiffs, as in the said declaration mentioned; and this the said defendants in the introductory part of this plea mentioned are ready to verify.

“And, for a further plea in this behalf, as to the breach of the said supposed promise in the said first count mentioned, the said defendants, in the introductory part of the

first plea named, say, that the said bill of exchange in the said first count mentioned never was accepted by the said defendants, except by the said *Evan Meredith Roberts*, for and on account of himself and all the said other defendants in this action mentioned, under and by virtue of an authority from the said last-mentioned defendants with the said *E. Meredith Roberts*, to accept bills of exchange on behalf of himself and the other defendants, for particular purposes only, that is to say, for the purposes of discharging claims against certain persons composing a certain company called the *South Metropolitan Gas Light and Coke Company*, or upon the said *E. Meredith Roberts* and the other defendants as directors of the said company; but that the said *E. Meredith Roberts* on the 22d day of *October*, in the year of our Lord 1833, in breach of good faith, fraudulently and wrongfully, and without the consent or authority of the defendants, in the introductory part of the said first plea named, and with intent to defraud them, accepted the said bill of exchange in the said first count mentioned, on behalf of himself and all the other defendants in this action, not on account of any of the purposes for which he was so authorized to accept bills on behalf of himself and the said other defendants as aforesaid, but for another and different purpose, to wit, for the private purposes of the said defendant, *William Clare*, who drew the same, and who then had no claim or demand whatever on the said other defendants, and of himself, the said *E. Meredith Roberts*, and the said defendant *Lewis Roberts*; and that the said defendants, in the introductory part of the said first plea named, received no consideration or value for the said acceptance; and this the said defendants, in the introductory part of the said first plea named, are ready to verify," &c.

To which pleas the plaintiffs replied as follows:—"And as to the plea of the said last-mentioned defendants by them secondly above pleaded as to the breach of the said promise in the said first count of the said declaration men-

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tioned, the plaintiffs say, that, after the making of the said bill of exchange in the said first count mentioned, and before the same had become due and payable, to wit, on the 4th day of *January*, in the year of our Lord 1834, the said bill of exchange was indorsed and delivered to the plaintiffs fairly and *bond fide*, and for a good and valuable consideration, that is to say, for monies advanced by, and due and owing to them, the plaintiffs; and the plaintiffs further say, that, at the time when the said bill of exchange was so indorsed and delivered to them as aforesaid, they had not, nor had either of them, notice of the premises in the said last-mentioned plea mentioned; nor did they, or either of them, know that the said *Thomas Hunt* had no power or authority to negotiate or part with the said bill on his own account; and this they are ready to verify," &c.

"And as to the plea of the said last-mentioned defendants, by them thirdly above pleaded, as to the breach of the said promise in the said first count mentioned, the plaintiffs say that the said *Evan Meredith Roberts* was duly authorized to accept the said bill of exchange, in the said first count mentioned, on behalf of himself and all the other defendants in this action; and the plaintiffs further say, that, after the making of the said bill of exchange, and before the same had become due and payable, to wit, on the said 4th day of *January*, in the year of our Lord 1834, the said bill of exchange was indorsed and delivered to the plaintiffs, fairly and *bond fide*, and for a good and valuable consideration, that is to say, for monies advanced by, and due and owing to them, the plaintiffs; and the plaintiffs further say, that, at the time when the said bill of exchange was so indorsed and delivered to them as aforesaid, they had not, nor had either of them, notice of the premises in the said last-mentioned plea mentioned; nor did they, or either of them, know for what purpose the said *Evan Meredith Roberts* was authorized to accept the said bill of exchange, nor for what purpose he accepted the same; and this they are ready to verify," &c.

“ And the said defendants, *William Baker, James Foster, George Holgate Foster, William Lyall, and Frederick Blakely*, as to the replication of the said plaintiffs to the plea of them the last-named defendants, by them secondly above pleaded, say, that the said replication is not sufficient in law; and the said last-named defendants state and shew to the Court here the following causes of demurrer to the said replication to the said second plea, that is to say, that the said plaintiffs have not in their said last-mentioned replication stated or set forth with sufficient certainty what consideration or value was given by them the said plaintiffs for the said indorsement of the said bill of exchange to them the said plaintiffs, but have merely stated that the consideration for the said indorsement to them was, monies advanced by, and due and owing to them the said plaintiffs, without stating with sufficient certainty when or to whom such monies were advanced, or by whom the same were due and owing, or whether they were advanced at the time when the said bill was indorsed to them, or whether they had been previously advanced, and were due before the said bill was indorsed; and that, although the replication is intended as an answer to the second plea, and to support the whole of the plaintiff's claim to the full amount of the bill mentioned in the declaration, yet it did not aver or state with sufficient certainty that the monies so advanced by, and due and owing to them the said plaintiffs, were equal to the amount of the said bill, or entitled them to recover to the full extent of the said bill, which, according to the rules of pleading, ought to have been shewn, stated, and set forth in the said replication to the said second plea; and for that the said plaintiffs, who were parties to the indorsement of the said bill, and knew what consideration they gave for the same, ought to have set forth in the said last-mentioned replication with more certainty than they have done the nature and extent of the consideration which they gave for the

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said indorsement, and when that consideration was given, to have enabled the defendants, who were no parties to the indorsement, or to the alleged consideration for the same, to ascertain what that consideration, if any, was."

Bompas, Serjt., supported the demurrer.—This is totally different from the cases in which defendants simply plead that there has been no consideration, which merely calls upon the plaintiffs to reply that there was consideration. The substantial question is, whether that which would heretofore have been good in evidence, is now good in pleading. According to the rules of pleading, the plaintiffs ought more distinctly to have denied any knowledge of the fraud set out in the defendants' pleas. If the defendants had proved that which is upon these pleas, the plaintiffs would have been obliged to prove the actual consideration they gave for the bill. Under the new rules, they must shew it upon the pleadings. If so, the question is, how the consideration ought to be set out? The defendants contend that it ought to have been shewn when and to whom the consideration was given, and to whom it was due. The replication gives no information upon those points, nor does it state that there was any request, or in what respect the money was advanced. Now, replications, it must be remembered, ought to be more particular than a count, especially where the transaction is between parties strangers to the defendants, as appears in cases innumerable in *Com. Dig.*, *Assumpsit*, F. 6, and H. 3. There are numerous other cases in point for the defendants: *Heath v. Sansom* (a), *Roxer v. Roxer* (b), *Marriot v. Lister* (c), *Osborne v. Rogers* (d), *Oliverson v. Wood* (e), *Hayes v. Warren* (f). But there is another good objection to the replication. It

(a) 2 B. & Ad. 291, S. C. 4 B. & Ad. 172.
(b) 2 Vent. 36.
(c) 2 Wils. 141.

(d) 1 Sand. 264.
(e) 3 Levinz, 366.
(f) 2 Strange, 933.

appears on the record, that the plaintiffs have given *some* valuable consideration; but not how much. It ought to appear that they claim a particular sum; but no particular sum is here claimed, for it is not said that they gave *full* but valuable consideration for the bill. That averment may be true, if the plaintiffs only paid 10*l*. If they had named a particular sum as due to them on the bill, the defendants might have paid it.

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Kelly, in support of the replication.—Even if it be necessary to set out a specific consideration, enough is here set out; but it is desirable that the Court should settle the general question, which is an important one, *viz.* whether, upon a declaration on a bill of exchange, and a plea amounting in substance to an allegation of want of consideration, it is not sufficient to reply in terms that there was good and valuable consideration passing from the plaintiffs, the indorsees. Till the promulgation of the new rules, it was not necessary in actions on bills of exchange to shew consideration on any part of the pleadings; and it is difficult to conceive on what grounds it can be contended that the law was intended to be altered by these rules. If the judges had intended that the plaintiff should set forth consideration, they would have made a rule for the purpose. The cases cited, therefore, do not apply; but if the plaintiff were called upon to set forth the full consideration he may have given for a bill of exchange, it would change the whole law and the whole course of evidence. There is no reason for this, for the parties are by the pleadings brought to an issue, which is, that the plaintiffs gave consideration for the bill. It would be extremely inconvenient in cases of bills of exchange, which stand on a peculiar basis, if the plaintiff could be compelled to do more than allege distinctly that he has given good consideration. The circumstances under which bills are transferred may be of the most complicated nature. A bill may have been

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indorsed as a collateral security for a debt due under other circumstances. Further, to require a plaintiff to set out the consideration which he gave for a bill would lengthen pleading, and not narrow the issue, as intended. But the main ground on which it is contended to be unnecessary to set out the consideration specifically, but to aver simply that there was good and valid consideration, is this:—that it would make an averment of the plaintiff's good in one set of circumstances, but insufficient on account of an additional allegation on the other side, which would lead to this anomaly, that the same facts, which would have to be proved in the same way, would have to be alleged in different manners in pleading. But, supposing it were necessary to be more particular in specifying the consideration, I submit that it is here specified in this replication as far as it can be, if parties are not to go into evidence of a fact as well as to state it. The replication avers that the bill was indorsed to the plaintiffs for a valuable consideration, that is, for monies advanced by them. The objection is, that it does not state from whom the debt is due to the plaintiffs. If it were necessary that the debt should be due by the person indorsing the bill, or by some party to the bill, it might be necessary to set out that particular; but, as the law stands, provided money be really due to the plaintiff, and the bill be indorsed to him in payment, why should the record be incumbered with saying by whom it is due?

Bompas, Serjt., submitted that what was urged on the other side did not support the replication, inasmuch as the new rules were intended to have an effect upon the evidence, and that, unavoidably, their adoption must lengthen the pleadings.

TINDAL, C. J.—With respect to the third plea, it states in effect that the defendant was defrauded at the time he

gave his acceptance, and that it was given by him without consideration. Now, as the indorsee of a bill of exchange is presumed *prima facie* to hold it upon consideration, and as we are not to presume a notice which would make him a fraudulent agent, and as this plea is silent as to the want of consideration and of notice, we have to consider whether the fact of allegation of fraud is enough against an innocent indorsee. In my opinion it is not sufficient, and therefore the plea is bad.

But the second plea does, in effect, allege that the acceptors were defrauded of their acceptance, that notice of the fraud was given to the plaintiffs, and that they received the bill without giving full and valuable consideration. It is to the replication to this plea that objection is taken. Now in that replication there is a denial of notice, and an assertion that the bill was delivered to the plaintiffs for full and valuable consideration. The question is, whether they are bound to state the consideration more particularly. It appears to me that there is sufficient consideration affirmatively stated to have passed between the holder of this bill and the indorsees who have brought the action. They say it was indorsed to them for monies advanced by and due and owing to them the plaintiffs. This is quite sufficient, certainly, in a replication; although, perhaps, it would not be sufficient to found a count upon in a declaration. Certainly, in a replication to a count, intent is sufficient (a). If, therefore, a person of plain understanding would interpret the allegation in a way which would unavoidably lead him to the conclusion that there had been a money consideration passing between the parties, it is sufficient. Such being the case here, the objection to the replication is disposed of.

I am, moreover, myself inclined to go further, and say, as a matter of opinion, that, if this replication had contained

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(a) Com. Dig., title Pleader, F.

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a simple denial of the allegation of want of consideration, it would have been sufficient. The case is analogous to one of ordinary occurrence. In an action against an executor who pleads outstanding bonds or judgment, to which it is answered that they were given without consideration, and are kept on foot by fraud, it has always been considered sufficient to deny the fraud so alleged. The principle is the same here, for the bill of exchange itself implies consideration, which the other party must beat down. Judgment must therefore be for the plaintiffs.

PARK, J.—The third plea is undoubtedly bad; and therefore the plaintiffs have a right to take advantage of it, without going into their replication. Now that the new rules, as they are called, oblige a defendant to put on the record what his defence is, it is difficult to say in general what degree of particularity should be gone into in a replication; but in the case of bills of exchange, great allowance must be made for the generality of replications, or we shall cramp commercial dealings. I am rather inclined, therefore, to agree with the Lord Chief Justice that a general allegation of consideration would have been sufficient; but it is not necessary in this case to say, that, because the replication here is clearly sufficient, it is not necessary that a replication should have all the particularity of a count in a declaration: it is sufficient if it state that there was *bonâ fide* valuable consideration, and it must be taken on the words here used, that, at the time of the indorsement, there was fair and full consideration given.

VAUGHAN, J.—I am of the same opinion. It is important that, in giving effect to these new rules, we should not entangle justice in a net of forms.

BOSANQUET, J.—I am of the same opinion on both the

points brought before us. The passage in the rules is framed in a different form from that commonly supposed. The rule does not say that illegal consideration, or want of consideration, shall be pleaded; but that, in every species of *assumpsit*, all matters "which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded;" as "drawing, indorsing, accepting, &c. bills or notes by way of accommodation (a)." So that the defendant should plead *affirmatively* and the plaintiff negatively; and the latter must not be deprived of the advantage of simply doing so, because the defendant chooses to make the terms of his plea negative. I am disposed to think that the replication would have been sufficient, if it had simply negatived the point of consideration, and had not added what the nature of the consideration was.

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Judgment for the plaintiff.

(a) Reg. Gen. H. 4 W. 4, ante, Vol. 2, p. 323.

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THIS was also an action on a bill of exchange, by an indorsee against the acceptor. The plea averred want of consideration, and the replication simply that there was consideration, not stating what the consideration was, or even its nature. Demurrer on the same ground as in the last case. It is unnecessary to give the argument.

Where an acceptor, to an action on a bill of exchange by an indorsee, pleads want of consideration, it is sufficient for the plaintiff, in his replication, simply to aver that there was consideration.

Per Curiam.—This case has been decided by the last. The Court has already adverted to the analogy to this case arising in actions against executors who plead bonds on outstanding judgments. To those cases may be added

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actions of debt on bonds, to which it is answered that they were obtained by fraud. It has never been supposed that the plaintiff is obliged in his replication to set out all the particulars of the consideration, but simply to traverse the plea. The case of *Lowe v. Aldred* (a) has been referred to as an authority to shew that the consideration ought to be fully set out by the plaintiff in his replication. That was an action on a promise to pay the debt of a third person, to which the defendant pleaded that there was no agreement in writing. The Court of *Exchequer* appeared to think that the agreement ought to have been set out in the replication. That may have been so in that case, for it was a written agreement of which the Court was to judge and not a jury. So, in like manner, an award must be set out. But here the question is, whether full and valuable consideration was given or not; the very question, if any, for a jury to decide.

Judgment for the plaintiff.

(a) 1 C. & M. 239.

BARNES v. JACKSON and Others.

The General Rules of H. T. 2 Will. 4, only apply to actions in which the Courts who made them have concurrent jurisdiction.

The year within which a plaintiff must, according to the rule of law, deliver his declaration, is, in real as well as personal actions, to be reckoned from the return day of the writ, and not from the date of the defendant's appearance.

A WRIT of *quare impedit* had been sued out by the plaintiff in *December*, 1833, returnable on the 8th *January*, 1834. Two defendants appeared to the writ on the 11th *January*. An *alias* writ was sued out, returnable in *April*, before the third defendant, the incumbent, appeared. The declaration was not delivered till the 10th *January*, 1835. A rule was then obtained, calling upon the plaintiff to shew cause why the declaration delivered against the three defendants should not be set aside for irregularity.

Wilde, Serjt., in support of the rule.

Coleridge, Serjt., against it:

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The Court having taken time to consider of its judgment, it was afterwards delivered by—

TINDAL, C. J.—This is a rule calling upon the plaintiff to shew cause why a declaration in *quare impedit*, delivered against the three defendants, should not be set aside for irregularity. Two defendants, duly summoned by a writ returnable on the 8th *January*, 1834, appeared on the 11th of that month. The third defendant did not appear to the first writ, and an *alias* was issued, returnable on the following *April*, to which he did appear. The declaration was not delivered till the 10th *January*, 1835. One ground of the motion was the 35th section of the first General Rule of *H. T. 2 W. 4 (a)*. We think those rules do not extend to real actions, but only to actions in which the three Courts exercise a concurrent jurisdiction. But it is a rule of law, laid down in the second volume of the *Term Reports*, p. 112, that a plaintiff must declare against a defendant within twelve months. What Mr. Justice *Buller* says is, “By the general rules of law a plaintiff must declare against a defendant within twelve months after the return of the writ; but, by the rules of this Court, if he do not deliver his declaration within two terms, the defendant may sign judgment of *non pros*. Though, unless he take advantage of the plaintiff’s neglect, the plaintiff may still deliver his declaration within the year.” The same rule is recognised in the 3rd *Term Reports*, p. 123, and in 9 *Bar. & Cress.* 544 (*b*). It is also recognised in *Cooper v.*

(a) A plaintiff shall be deemed out of Court, unless he declare within one year after the process is returnable. *Regulæ Generales*, 1 *H. T. 2 W. 4*, s. 35. Ante, Vol.

1, p. 187.

(b) In *Morton and Thompson v. Grey and Bothwick*, a case exactly the same as the present, except that it was not a real action.

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Nias (a); and there the question arose as to whether the twelve months are to be calculated from the return day of the writ or the time of appearance. The Court says, "The rule is, that, if the plaintiff does not declare within a year after the return day of the writ, he is out of Court. The safest course is, to reckon the twelve months from the return day; the time given to put in and perfect bail is merely matter of indulgence." No case appears in which this rule is applied to real actions; but no distinction is made in any of the books between actions real and personal, and the principle of the rule applies to actions of all kinds, its object being to prevent suits being kept alive an unreasonable time after the parties are in Court. If a demandant be not bound to declare within one year, there is no reason why he should for an indefinite period. We therefore think that the plaintiff is out of Court as to the two defendants who appeared to the original writ, and that the declaration is irregular as to them, and must be set aside. As to the defendant *Jackson*, who appeared to the writ returnable in *April* last, the plaintiff is entitled to declare against him, and against him the proceedings may go on.

Wilde, Serjt., subsequently applied to the Court to know whether it did not intend to set aside the declaration. If the names of the two defendants who had appeared to the first writ were merely struck out from the declaration, and it was left as good against the other defendant, he might have a difficulty in pleading in abatement, which he had a right to do.

Per Curiam.—As the declaration against the three is irregular, it must be set aside.

Rule absolute.

(a) 3 B. & Ald. 272.

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TROTTER v. BASS.

ASSUMPSIT on a bill of exchange. The amount indorsed on the writ of summons was 25*l.*, and that was the sum claimed in the declaration and in the particulars. The plaintiff, however, becoming desirous of having the cause tried before the sheriff, summoned the defendant before Mr. Justice *Gaseles*, at chambers, to shew cause why that should not be ordered. When there, he, as a preliminary step, applied to the learned Judge to amend the writ by reducing the amount to 15*l.* This was done, and the cause was ordered to be tried before the sheriff of *Middlesex*.

A Judge at chambers cannot amend the indorsement of a writ of summons by reducing the amount of the claim indorsed upon it, in order to try the cause before the sheriff.

Sewell obtained a rule, calling upon the plaintiff to shew cause why this order should not be rescinded, on the ground of want of power on the part of the learned Judge to alter a perfect writ.

Talfourd, Serjt., shewed cause against the rule.—The reason why the plaintiff wished to have the writ of summons amended was, that, after the declaration was delivered, he discovered the defendant to be entitled to an allowance of 10*l.*, and, on payment of costs, he was permitted to amend the writ, and have the case sent for trial before the sheriff.

Per Curiam.—The Judge has no power, under the 3 & 4 *Will.* 4, c. 42, to make such an order as this, for that section only applies to cases where the sum “sought to be recovered, and indorsed on the writ of summons, shall not exceed 20*l.* ;” and the plaintiff cannot be allowed to take his chance of the money being paid, and having the higher rate of costs, and, when he finds resistance, try before the sheriff.

Rule absolute.

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MILLER v. MILLER.

The new rules of pleading are confined to such actions as all the Courts have jurisdiction over, and therefore do not extend to real actions.

W. H. WATSON moved for a rule to shew cause why the plea in a writ of right should not be set aside. The ground upon which he moved was, that it was intitled of *Hilary* Term, in the fifth year of *Will. 4*, instead of being intitled of the day of the month and year when it was delivered, as it ought to be under the first of the General Rules of Pleading (a).

TINDAL, C. J.—But do these rules apply to real actions? They are rules made by all the Courts; and there is nothing in them relating to revenue causes, which are cognizable by the *Exchequer* only; nor to crimes, which the *King's Bench* only can investigate; nor to real actions, which can only be dealt with in this Court.

W. H. Watson called the attention of the Court to the wording of the 3 & 4 *W. 4*, c. 42. The first section was quite general, and gave the Judges power to alter the mode of pleading "in actions at law," without restriction of any particular action. Neither was the rule on which he relied restrictive, but large enough to comprehend every species of suit. The question of whether the new rules of pleading applied to real actions was an important one.

TINDAL, C. J.—If this question had depended solely upon the 3 & 4 *W. 4*, c. 42, it must have been held, upon a just construction of the first section, interpreted as it may be by the preamble, that the power there given to the Judges to make rules and orders as to pleading was confined to such suits as all the Courts had concurrent jurisdiction over. But the question does not entirely rest upon that statute. By the 11 *Geo. 4* & 1 *Will. 4*, c. 70, s. 11, power was

(a) Ante, Vol. 2, p. 313.

given to the Judges of the three Courts to make general rules and orders in matters of practice, over which they "have a common jurisdiction." Then comes the subsequent statute, giving similar powers, though not using precisely the same words, in pleading. These statutes are *in pari materia*; one is made in aid of the other, and they must, therefore, be construed together.

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PARK, J., VAUGHAN, J., and BOSANQUET, J., concurred.

Rule refused.

GRANT v. GIBBS.

KELLY appeared against a rule calling upon the plaintiff to shew cause why the proceedings on the bail-bonds taken in this and two other suits should not be set aside. The defendant resides more than forty miles from *London*, and having been arrested in the several actions in question, he did the act of putting in special bail within eight days, but did not give notice of having done so till after they had expired. The point upon which the plaintiff relies is, that the defendant was too late, eight days only being allowed for completely putting in special bail, including the notice. That the notice is included was established by a rule of Court of *Easter Term*, 49 *Geo. 3*, which is unrepealed by any subsequent statute or rule. By that rule it is ordered, that, when special bail shall be put in for the defendant, a notice in writing of such bail being so put in shall be forthwith given to the plaintiff's attorney or agent, and that no special bail shall be considered as put in until such notice has been given (*a*). Then comes rule 11 of *Hilary Term*, 2 *Will. 4*, which says,

Rule 14 of *Reg. Gen. H. T. 2 W. 4*, has been virtually abrogated by 2 *W. 4*, c. 39.

The expression "putting in special bail," used in the 16th section of that statute, means, the putting in of special bail, and giving notice thereof.

(*a*) 1 Taunt. 416.

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that, "in the case of country bail, the bail-piece shall be transmitted and filed within eight days, unless the defendant reside more than forty miles from *London*; and, in that case, within fifteen days after the taking thereof (a)." It is upon this rule that the defendant relies; but it is submitted that it is virtually repealed, and that the statute gives only eight days for taking and putting in the bail, filing the bail-piece, and giving the notice. By the 16th section of the 2 *Will.* 4, c. 39, it is enacted, "that all such proceedings as are mentioned in any writ, notice, or warning issued under this act, shall and may be had and taken in default of a defendant's appearance, or putting in special bail, as the case may be." Now, in the form of the writ of *capias* given in the schedule of the act, these words occur:—"And we hereby require the said *C. D.* to take notice, that, within eight days after the execution hereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him in our Court of — to the said action; and that, in default of his so doing, such proceedings may be had and taken as are mentioned in the warning hereunder written or indorsed hereon." Among the *memoranda* required to be indorsed on the writ, is one warning the defendant, that, if he does not put in special bail, as required, proceedings may be taken on the bail-bond. It is to be observed, also, that the bail-bond contains a direct reference to the requisition of the writ of *capias*. There has been no decided case upon the point; but the actual practice has been conformable to the interpretation put upon the statute by the plaintiff, which is, that it has repealed the rule of *Hilary* 2 *Will.* 4. An officer of the Court (b) has taken the same view of the matter in his book on Practice.

PARK, J.—Then, according to your argument, a man

(a) Ante, Vol. 1, p. 185.

(b) Master Chapman.

arrested in *Cumberland* is to have no more time to put in special bail than a man arrested five miles from *London*?

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Kelly.—That is the argument: and the man in *Cumberland* would have abundance of time; for the post is not more than forty-eight hours in reaching the most distant part of *England*. Before the late act, a party residing within forty miles of *London* had only four days, while one beyond had eight days. Now all have eight days. If the construction we contend for be not put upon the statute, parties will have above twenty days to put in and file bail; certainly too long a period. Further, it is desirable that the proceedings against the bail on the bail-bond, and against the sheriff, should proceed *pari passu*; but if the construction we contend for be not adopted, the sheriff will be fixed before proceedings can be had against the bail.

Merewether, Serjt., in support of the rule.—The whole point turns upon the construction of the statute 2 Will. 4, c. 39, and the fourth form in the schedule attached to it; but there is one clause in it which has not been adverted to, that is, the 14th, by which the Judges are enabled to make rules for carrying the provisions of the act into effect. Now, as the Judges have made no alteration in the rule of *Hilary* Term, 2 Will. 4, may they not be considered to have continued it?

Bosanquet, J.—That rule was not intended to alter the practice, but merely to make the time allowed, which before varied, the same in all the Courts.

Kelly.—Two cases have been decided upon the point. They are *Alston v. Underhill* (a), in which

(a) Ante, Vol. 2, p. 26.

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one of the points decided was, that "the rules of Court issued before the Uniformity of Process Act passed, do not apply to proceedings under that act;" and *Hillary v. Rowles* (a), in which the marginal note is, "If a defendant does not put in special bail within eight days after the execution of the *capias*, inclusive of the day of execution, the plaintiff may proceed on the bail-bond immediately."

Merewether.—The first case does not apply.

TINDAL, C. J.—But it shews that it has been decided that the rule you rely upon does not apply under the Uniformity of Process Act. You must, therefore, come to the act.

Merewether.—If the Court feels itself bound by that case, I must shape my further argument on the form given in the schedule of the act. It has been contended, that putting in bail means giving notice of its having been done; but if the legislature had so meant it, nothing would have been more easy than to have employed words to that effect. The two acts are distinct, and the writ, with its warnings, was intended to give notice to lay parties unacquainted with the arbitrary construction put upon the expression "putting in bail" by the Courts.

TINDAL, C. J.—It appears to me that the grounds upon which this rule was obtained have, upon discussion, entirely failed. It was granted upon the 14th rule of the Judges, *Hilary* Term, 2 *Will.* 4, that is, 1832. If that rule had been subsisting in full force, the defendant might have supported his application; but an act of Parliament received the royal assent on the 23rd *May*, 1832, the provisions of which are inconsistent with the rule. The

(a) Ante, Vol. 2, p. 201.

form of the writ of *capias* given in 2 Will. 4, c. 39, the indorsements upon it, and the 16th section of that statute, all go to set aside the rule of *Hilary Term, 2 Will. 4*. The only remaining question is, the meaning of the words used by the legislature as applied to the expression "putting in special bail." Now I think we should be flying from a useful and necessary mode of interpretation were we to suppose the legislature to intend to put a meaning upon an expression of practice different from that put upon it by the Court; and there is no existing rule of this Court which says that special bail shall not be considered as put in, till notice thereof has been given. The defendant, however, has acted under a mistaken view of the law, which induces us to set aside the proceedings against the bail on payment of costs.

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PARK, J.—We cannot do more than impose those terms, for the rule certainly raised a difficulty in the way of an attorney or other practitioner. But the rule is controlled by the act of Parliament; and although I should have thought it wise to give parties at a distance in the country a longer time than parties in town, we are bound to administer the law as we find it.

VAUGHAN, J.—The terms of the act are so clear that we cannot mistake them; and, with respect to the distance at which some parties may be from *London*, that was, also, I think, in the contemplation of the legislature; for, in the form of the writ of *capias*, these two addresses are given, "To the Constable of *Dover Castle*," and "To the Mayor and Bailiffs of *Berwick-upon-Tweed*."

BOSANQUET, J.—The Uniformity of Process Act has superseded the rules of *Hilary, 2 Will. 4*, so far as they apply to the present case. The object of those rules was merely to regulate the then practice of all the Courts, and

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the Uniformity of Process Act was not contemplated in them. The language of the act as to putting in bail must be construed with reference to the existing practice of the Court. But I agree in thinking that we should set the proceedings aside on payment of costs.

Rule absolute, on payment of costs.

GREY v. HUTCHINS.

In an action for a malicious arrest, the Court discharged a rule for judgment as in case of a nonsuit, with costs, where the plaintiff shewed that he only forbore proceeding to trial because the defendant had instituted criminal proceedings against him on the charge for which the arrest was made.

BOMPAS, Serjt., shewed cause against a rule obtained by *Atcherley*, Serjt., for judgment as in case of a nonsuit. The action was brought for a malicious arrest, the defendant having taken him to the police office on a charge without foundation, which had been dismissed by the magistrate. After the action was commenced, which was not till some time after the arrest, the defendant preferred an indictment against the plaintiff, charging him with the same offence as before. The plaintiff, therefore, suspended his proceedings, and was ready to take his trial at the *Old Bailey*, but the defendant removed the indictment by *certiorari* into the *King's Bench*, where the proceedings being still pending, the plaintiff was of course unwilling to go on with his action.

Atcherley, Serjt., in support of the rule.—The plaintiff might safely go to trial whilst the criminal proceedings are pending, and he should therefore give us a peremptory undertaking.

PARK, J.—No counsel could reasonably advise the plaintiff to proceed, till the criminal proceedings are disposed of. I think the rule should be discharged, with costs.

Atcherley, Serjt.—It is matter of speculation with the

plaintiff as to which course would be most advantageous to him. Why, then, should the rule be discharged with costs? A plaintiff frequently withdraws his record upon discreet grounds; but is the defendant to pay for it? The defendant does something which makes it a matter of discretion with the plaintiff to proceed; but he forbears going to trial, to better his own case.

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Per Curiam.—By the act of the defendant, it has become unreasonable to urge the plaintiff to trial. The rule must, therefore, be discharged with costs.

Rule discharged accordingly.

LEUCKHART v. COOPER and Another.

TO an action of trover against a warehouseman, for certain wools, the defendant pleaded, *first*, the general issue; *second*, a right of lien by particular agreement; *third*, a right of lien by usage; and *fourth* and *fifth*, the same usage, but in respect of delivery by different persons.

To a declaration in trover, the defendant was allowed to plead a right of lien by agreement, a right of lien by usage, and the same usage in two other pleas, but with reference to a delivery of the goods by two different parties.

W. H. Watson opposed a rule to plead these several matters, on the ground of their being against the 5th of the new rules of pleading (*a*), and the general issue was certainly idle.

R. V. Richards, contra, contended, that the pleas were intended to establish distinct grounds of defence.

TINDAL, C. J.—The question is, whether these pleas will support substantially different grounds of defence. The general issue must be given up; but the two next

(a) Ante, Vol. 2, p. 314.

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certainly appear to stand independently of each other; and I cannot say that the two last do not also.

PARK, J., and VAUGHAN, J., concurred.

BOSANQUET, J.—If different pleas are evidently intended to set up the same defence in different forms, the Court is not at liberty to allow them; but I cannot see with sufficient clearness that the different pleas before us are intended to establish the same defence. If at the trial the Judge is satisfied, on the defendant's representations, that a distinct defence was *bond fide* intended to be rested upon each plea, he will so certify; but if it turns out that the defendant has only one substantial defence, he will lose all his costs upon the other pleas, although he succeeds upon one.

Rule absolute, striking out the general issue.

HUMPHREY v. WOODHOUSE and Others.

Officers of the metropolitan police, acquitted in actions brought against them for matters done in the execution of the 10 Geo. 4, c. 44, s. 41, are entitled to their costs as between attorney and client, notwithstanding a certificate granted under the 3 & 4 Will. 4, c. 42, s. 32.

THIS was an action for an assault and false imprisonment. Two of the defendants were police officers, and were acquitted at the trial; but the Lord Chief Justice, upon the application of the plaintiff's counsel, certified under the 3 & 4 Will. 4, c. 42, s. 32, that there was reasonable and probable cause for making them defendants, with a view to deprive them of their costs.

Busby obtained a rule calling upon the plaintiff to shew cause why the acquitted defendants should not have their costs as between attorney and client, notwithstanding the certificate of the learned Judge. He founded his motion upon the 41st section of the Metropolitan Police

Act (10 *Geo.* 4, c. 44), by which it is enacted, for the protection of persons acting in the execution of the act, that, in an action for any thing done in pursuance of that act, "if a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue any such action after issue joined, or if, upon demurrer or otherwise, judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, and have the like remedy for the same as every defendant hath by law in other cases; and though a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the Judge before whom the trial shall be, shall certify his approbation of the action and of the verdict obtained thereupon." The object of the legislature was clearly to protect policemen in the execution of their duty. The last part of the clause particularly shewed that to be the case. The subsequent act, under which the learned Judge had certified, was not meant to repeal the particular provisions of the Metropolitan Police Act; but to extend the benefits of the 8 & 9 *Will.* 3, c. 11, s. 1, by giving acquitted defendants in any personal action their costs.

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Wilde, Serjt., and *Humfrey*, shewed cause against the rule, and contended that it could not have been the policy of the legislature to deprive the Judge of the power of certifying, for the protection of the public, that a police officer had been properly joined as a defendant. To do so would be to deprive the plaintiff of his remedy against the defendant, with respect to whom he does succeed, under pretence of protecting the police officer.

TINDAL, C. J.—It certainly appeared to me at the trial that the 3 & 4 *Will.* 4, c. 42, s. 32, having been passed subsequently to the 10 *Geo.* 4, did, to the extent in question, repeal it; but now, upon looking more closely into

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the matter, we think the only object of the 3 & 4 *Will.* 4 was to extend to all personal actions the remedy given to defendants by the 8 & 9 *Will.* 3, which only applied to certain specified suits. The next question is, whether the 3 & 4 *Will.* 4 repeals the intermediate statute? I do not think that it does; and the 10 *Geo.* 4 itself, instead of giving the Judge power to certify to deprive an acquitted defendant, acting under that act, of costs, gives him power to deprive even a successful plaintiff of his costs.

PARK, J.—The words of the 3 & 4 *Will.* 4 are so extremely general that I am not surprised at his lordship having certified under them; indeed, as the question is of importance, it was judicious of him to do so, for it could not have been satisfactorily decided at *Nisi Prius*. The 32nd sect. of the act of 3 & 4 *Will.* 4, was only intended to remedy the omissions of the 8 & 9 *Will.* 3, while the provision of the Police Act was meant to throw protection around a particular class of persons, engaged in the execution of a difficult and dangerous duty. The last words of the 41st section, referred to by his lordship and Mr. *Busby*, are strong to shew the intention of the legislature.

VAUGHAN, J.—We should cripple the efficiency of the Metropolitan Police Act if we were to deprive the acquitted defendants of their costs.

BOSANQUET, J., concurred.

Rule absolute.

(b) 1 H. Black. 23.

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to the equitable claims of the parties in the cause." But in the note to this case, *Hall v. Ody* (a) is referred to, and in that case Lord *Eldon* expressed his opinion of the propriety of reconsidering the practice of this Court. There are also the cases of *Nunex v. Modigliani* (b), *O'Connor v. Murphy* (c), *Browne v. Benett and Others* (d), *Mitchell v. Oldfield* (e), *Randle v. Fuller* (f), and *Glaister v. Hewer* (g), which shew the difference there has been in the practice of the *King's Bench* and the *Common Pleas*; but by the general rules of *Hilary, 2 Will. 4*, it is clearly intended, that, in future, no costs shall be set-off to the prejudice of the attorney's lien, except interlocutory costs in the same suit.

Wilde, Serjt., in support of the rule, contended that the rule of Court distinctly recognised the equity of the parties in the cause as paramount, and that had been the principle on which the Court had always acted, as appeared in the authorities referred to on the other side, which were all in his favour.

Per Curiam.—The rule of *Hilary, 2 Will. 4*, does not apply to this case, but only to cases of set-off between parties adverse to each other, and in this case the several defendants are not adverse parties. The question rests, therefore, upon the case of *Schoole v. Noble*; and the rule must, in consequence, be made absolute. The only difference between the cases is, that here the judgment goes against one of the defendants by verdict, whilst in *Schoole v. Noble* it went by default.

Rule absolute.

(a) 2 Bos. & Pul. 28.

(b) 1 H. Black. 217.

(c) Id. 657.

(d) 4 Bing. 423.

(e) 4 Term R. 123.

(f) 6 Term R. 456.

(g) 8 Term R. 70.

COURT OF EXCHEQUER,

Hilary Term,

IN THE FIFTH YEAR OF THE REIGN OF WILLIAM IV.

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D. WAKEFIELD moved to stay proceedings in this action, on payment of the debt and costs. An application had been before made for the same purpose to Mr. Baron Gurney at chambers, when it appeared, that, since this action was commenced, the defendant, who had a cross demand to a similar amount against the plaintiff, had brought an action against him for the recovery of it, instead of setting it off in this action. The learned Judge refused to make an order for paying the debt and costs in this action, except upon the terms of allowing the defendant's cross demand to be set off, so as to render the cross action unnecessary. These terms not being agreed to, the learned Judge refused to make the order. It was now contended that the defendant was entitled, as a matter of right, to stay proceedings in an action, on payment of the debt and costs.

A defendant who moves to stay proceedings on payment of debt and costs, is not entitled to a rule for that purpose as a matter of right, but must submit to such reasonable terms as the Court in its discretion may think proper to grant.

PARKE, B.—I think it is not a matter of right, and that the Court, in its discretion, may engraft terms when such leave is given. In an action against an acceptor of a bill of exchange, only the costs in that particular action can be recovered against him; but if he applies to stay pro-

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ceedings, the Court will only do so, on the terms of his also paying the costs of any actions against the drawer and indorsers. The rule, therefore, can only be granted on the terms mentioned by the learned Baron at chambers.

Rule refused.

BULLEN's Bail.

A two days' notice of justification by a prisoner, accompanied by an affidavit according to the rule of *Trinity Term*, 1 *Will.* 4, is bad, unless it expresses that he is a prisoner.

THE notice of justification of bail in this case was a two days' notice, accompanied by an affidavit in the form given by the rule of *Trinity Term*, 1 *Will.* 4, *Reg.* 3. The defendant was a prisoner, but the notice did not express that he was so. The officer objected to the bail being allowed to justify, on the authority of *Creighton's bail* (a), where a similar objection was held fatal.

Archbold, in support of the bail, contended that there was no ground for the objection.

ALDERSON, B.—Upon a question like this, it is better to adhere to an established rule, rather than to inquire into the precise reason of the practice for the purpose of unsettling it.

Bail rejected.

(a) Ante, Vol. 1, p. 609.

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HEALD's Bail.

ROBINSON objected to the affidavit of justification, on the ground that it did not follow the form given by the rule of *Trinity Term*, 1 *Will.* 4, which directs that the bail shall give a particular description of the street or place or number of the house (if any) where they have resided for the last six months. Here the affidavit only stated that the bail had been a housekeeper at *Stockwell Gate, Mansfield*, but did not say that he had resided there. This objection was made with a view to deprive the defendant of the costs of justification, it being admitted that the affidavit of justification was sufficient, so far as respected the property of the bail.

An affidavit of justification of bail stated that the bail was a housekeeper at S., but did not state that he resided there: —*Held*, that this was a sufficient deviation from the form given by the rule of T. T. 1 *Will.* 4, to deprive the defendant of the costs of justification.

Humfrey in support of the bail contended, that the allegation of his being a housekeeper at a particular place, was equivalent to an averment that he resided there; and insisted that such an objection could not be taken, except upon an affidavit that in fact the bail was not resident at that place.

PARKE, B.—The rule is, if the notice of bail be accompanied by an affidavit according to the form thereto subjoined, the plaintiff, if the bail are allowed, shall pay the costs of justification. The form alluded to has the word “resided.” The affidavit, therefore, is not made in the form given by the rule; and the better way is not to deviate from it. The defendant will therefore not have the costs of justification.

The other Barons concurred.

Costs disallowed.

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GOODNER v. COVER.

It is no ground for disallowing to the plaintiff's attorney his costs of conducting the action, that he was not on the roll of attorneys of this Court, if it appears that he conducted the proceedings in the name of a *London* attorney, who was an attorney of the Court.

HUMFREY, on behalf of the above defendant, moved to review the Master's taxation, and disallow the costs which had been taxed for the plaintiff on a verdict for him, after a trial before the sheriff of *Sussex*, on the ground that the proceedings for the plaintiff had been conducted by a *London* agent for the country attorney, and that the name of the country attorney who conducted the cause was not on the roll of attorneys in this Court. The papers were indorsed thus:—" *Sowton, Bedford Row, for Sowton and Parker, Chichester.*"

The Court having granted a rule *nisi*—

Dampier shewed cause upon an affidavit that the *London* agent, who was the attorney on the record, was an attorney of this Court; and he contended that there was nothing contrary to the 2 *Geo. 2*, c. 23, as the proceedings had all been conducted in the name of the *London* attorney.

Humfrey, in support of the rule, contended, that the country attorney was not entitled to his costs, and that therefore he was not entitled to detain the defendant in custody for them.

PARKE, B.—The country attorney practises in the name of the *London* attorney with his consent.

GURNEY, B.—The *London* agent's name being on the roll, and he being an attorney of this Court, I think there was nothing irregular.

Rule discharged.

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CLEMENTSON v. NEWCOMB.

W. H. WATSON obtained a rule *nisi* for setting aside a Judge's order for changing the venue from *London* to *Lincolnshire*, under these circumstances. The action was in case for a libel published in the *Lincolnshire, Rutlandshire, and Stamford* newspaper; and the affidavit stated that it circulated in those and other counties, and also in *London*.

In an action for a libel published in a country newspaper, which circulated in several counties, the Court set aside a Judge's order for changing the venue.

R. V. Richards shewed cause, and contended that the plaintiff ought to give material evidence in *London*; *sed per*

PARKE, B.—The order was clearly irregular; the venue should not have been moved to be changed, as the newspaper circulated in several counties.

Rule absolute.

HANWELL's Bail.

BUTT was proceeding to oppose the bail, when

Crowder, in support of the bail, objected to his doing so, on the ground, that though notice of exception had been given, it had not been entered in the book, and was therefore of no avail; and that the plaintiff therefore could not now oppose them.

Butt, contrà, contended, that as the defendant had given a notice of justification for that day, he appeared on behalf of the plaintiff, in pursuance of that notice, to oppose the bail; and that by giving such notice of justification, any objections that there might be to the notice of exception were waived.

The want of entry in the book of the notice of exception is waived by giving notice of justification.

A notice of justification, which stated that the bail had resided for the last six months at the parish of *W.* without stating the street, &c., held bad.

Costs of opposition on technical grounds are not allowed.

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HANWELL'S
Bail.

LORD ABINGER, C. B.—We think that the notice of justification waived the want of entry of the notice of exception. The notice of justification led the other side to think that all was regular.

Butt then objected to the notice of bail, which was in this form:—That the names and additions of such bail are *T. W.*, of the parish of *W.*, in the county of *Gloucester*, ironmonger, tinner, and nailer, a housekeeper; and *A. Page*, of *H. Street* in the parish of *Wotton-under-Edge* aforesaid, also a housekeeper; and that each of the said bail has for the last six months resided at the parish of *Wotton-under-Edge* aforesaid." This affidavit did not, he contended, sufficiently particularize the place of residence of the bail for the last six months.

PARKE, B.—We think this is a good objection.

Crowder applied for leave to amend.

Butt opposed the amendment.

LORD ABINGER.—We cannot allow the amendment; but upon an affidavit of merits, you may be let in to defend.

Butt applied for the costs of opposition.

PARKE, B.—The costs of opposition on such grounds cannot be allowed.

1835.

SCHOFIELD v. HUGGINS.

MANSEL, on behalf of the defendant, had obtained a rule *nisi* for setting aside a final judgment, (which had been regularly signed in this action which was in debt,) on payment of costs and on an affidavit of merits.

An affidavit to set aside a regular judgment, made by the *London* agent to the country attorney, and stating that the deponent believed, from the instructions received from the country attorney, that the defendant had a good defence to the action on the merits:—*Held*, sufficient.

Hughes shewed cause, and objected to the affidavit, as not being sufficiently positive. It was made by the *London* agent of the country attorney, the defendant residing in the country, and it stated, that, from the instructions received from the country attorney, the deponent believed that the defendant had a good defence to the action on the merits. He contended that if the agent was competent to make such an affidavit, he ought at least to have sworn that he believed the instructions to be true.

PARKE, B.—I think the affidavit is sufficient.

The other Barons concurred.

Rule absolute, on payment of costs.

DICAS v. LAWSON.

F. V. LEE moved for a rule *nisi* for an attachment against Lord *Brougham and Vaux*, for not attending as a witness on the trial of this cause. The affidavit was in the usual form, and alleged that his lordship was a material and necessary witness for the plaintiff: that he had been

A rule for an attachment against a witness for disobedience to a *subpoena*, will not be granted, where it clearly appears that his presence upon the trial would

have been of no use to the party subpoenaing him.

1835.
 }
 DICAS
 v.
 LAWSON.

personally served; and that 5s. had been tendered to him for his expenses.

PARKE, B.—This was an action for a libel, and was tried before me; and from my notes it appears that it was admitted at the trial, that the only object of subpœnaing Lord *Brougham* was, to shew the application of the libel to the plaintiff. The defence, however, was rested solely on the ground, that the publication complained of was not a libel, and the Solicitor-General's speech to the jury went entirely on that ground. No point was made as to the libel not applying to the plaintiff; if it had, I should have directed a nonsuit.

F. V. Lee.—There were other objects in view in subpœnaing his lordship; one was, to produce letters; another was, to disprove an imputation that the plaintiff's object was to extort money. It is not usual or necessary to state in the affidavit how the evidence of a witness was material: it is positively sworn that his lordship was a material and necessary witness. The ground of the motion is the contempt of the Court in not obeying its process; and there is here a sufficient *prima facie* case to call upon his lordship to clear himself of the contempt.

LORD ABINGER, C. B.—Generally, I agree that the affidavit would be sufficient, when the Court knows nothing of the transaction; but having the assistance of the learned Judge's notes who tried the cause, and of the learned Judge himself, we are in full possession of the facts; and if we see that there was no contempt, and no ground for an attachment, we ought not to grant a rule. We ought to take care not to allow the process of the Court to be used for the purpose of vexation to individuals. In the present case, the attendance of Lord *Brougham* at the trial would have been of no use to the

plaintiff, and the usual ground for granting the rule entirely fails. We think, therefore, that no rule ought to be granted.

1835.
 DICKS
 v.
 LAWSON.

PARKE, B.—There was no justification on the record; and, therefore, Lord *Brougham's* evidence would not have been admissible on any point, except that of the libel applying to the plaintiff; and upon that it was unnecessary, as the application of the libel to the plaintiff was not disputed.

The rest of the Barons concurred.

Rule refused.

PICKMAN v. COLLIS.

COTTINGHAM moved to set aside a writ of *capias*, on the ground of the attorney's name not being properly indorsed. The indorsement was thus—"Milne, Parry, Milne, and Morris, agents for Shaw, Billericay." It was contended that the christian names of the attornies ought to have been inserted. He also moved to discharge the defendant out of custody, on account of the affidavit of debt being defective; it was in these terms—"Edward Pickman, of Aldgate, in the city of London, waiter at an inn, maketh oath and saith, that George Collis is justly and truly indebted unto this deponent in the sum of 500*l.* and upwards, for money lent and advanced by this deponent to the said G. C., at his request, and for interest due on the said sum of 500*l.*, and for money due from the said G. C. to him, this deponent, upon an account stated between them; and this deponent further saith, that no tender or offer hath been made to pay the said sum of 500*l.*, or any part thereof, in any note or notes of the governor and

A writ indorsed M. & Co., agents for S., without specifying the christian names:—*Held*, sufficient.

An affidavit of debt for 500*l.*, for money lent, and interest thereon, and on an account stated, without noticing a contract for interest:—*Held*, sufficient.

1835.
 PICKMAN
 v.
 COLLIER.

company of the Bank of *England*, expressed to be payable on demand or otherwise." It was contended that, as money lent did not carry interest without an agreement to that effect, such an agreement ought to have been stated, and the affidavit ought to have shewn how much was due for interest.

PARKE, B.—The interest must be due by contract; the plaintiff swears that it *is* due. There is nothing in the other objection.

The rest of the Court concurred.

Rule refused (a).

(a) See *Rogers v. Godbold*, ante, p. 106.

STEWART v. LAYTON.

The record in an action for slander stated that the writ issued on the 4th of *June*, and that the words were spoken on the 27th:—*Held*, that this discrepancy on the record was no ground for arresting the judgment.

R. v. RICHARDS moved to arrest the judgment for the plaintiff, on the ground that it appeared by the record that the writ was issued before the cause of action accrued. The record stated that the writ issued against the defendant on the 24th of *June*, 1834, and that the slander for which the action was brought was spoken on the 27th of *June*. The writ being now the commencement of the action, it was material, he contended, that the cause of action should have accrued previously. He cited *Dickinson v. Plaisted* (a), where the record was made up generally of *Trinity* Term, and it appeared that the promissory note on which the plaintiff declared did not become due until the 5th of *September*; and upon a writ of error being brought, assigning for cause that the bill was filed before the cause of action accrued, the Court, though they gave leave to amend the

(a) 7 T. R. 474.

record upon an affidavit that in fact the note had become due before the action was commenced, only did so on payment of the costs of the amendment, and also of the costs in error. The day there was not more material than it is here. The plaintiff ought to shew that he had a cause of action existing at the time of issuing the writ.

1835.
STEWART
v.
LAYTON.

LORD LYNTHURST, C. B.—The day laid in this declaration was not material. In the case cited there appeared to be no cause of action at the time the bill was supposed to be filed.

PARKE, B.—The note was not due at the time. There is nothing in the objection.

Rule refused.

SMITH v. WHEELER.

BUTT applied on behalf of the defendant in this action, under the 1st section of the Interpleader Act (a), for a rule calling upon the plaintiff and *Ann Smart* to appear and state their claims, the defendant being sued in trover and having no interest in the subject of the action. He also moved that the rule might be drawn up as a stay of proceedings; but no notice of the motion having been given—

A rule under the 1st section of the Interpleader Act cannot be drawn up for a stay of proceedings, unless notice has been given. Such a rule may be drawn up to shew cause at chambers.

The Court said that could not be done.

Butt then applied to have the rule drawn up to shew cause at chambers, there not being sufficient left of the term to entitle him to call on these parties to shew cause within the term.

PARKE, B.—I think you may have the rule drawn up

(a) 1 & 2 Will. 4, c. 58.

1835.
 —————
 LEWIS
 v.
 DALRYMPLE.

had no right to do. You must, therefore, elect either to pay the defendant his costs or to proceed. He has no other means of being indemnified for his costs.

The rest of the Court concurred.

Rule absolute without costs, being to set aside a Baron's order.

BRISCOE v. ROBERTS.

Semble, that the venue may now be changed in a local action.

An allegation that an impartial trial cannot be had, must be satisfactorily made out to induce the Court to interfere.

PLATT moved for a rule to shew cause why the issue joined in this action should not be tried in *London*, or *Middlesex*, instead of *Surrey*. The action was in trespass, for trespassing upon the plaintiff's land, and, being local, he could not, he said, move to change the venue.

PARKE, B.—Yes, you can now, under the new act (a).

(a) The 3 & 4 Will. 4, c. 42, s. 22, enacts, "that in any action depending in any of the superior courts, the venue in which is by law local, the court in which such action shall be depending, or any Judge of any of the said Courts, may, on the application of either party, order *the issue to be tried* or *writ of inquiry to be executed*, in any other county or place than that in which the venue is laid; and for that purpose any such Court or Judge may order a suggestion to be entered on the record that the trial may be more conveniently had, or writ of inquiry executed, in the county or place where the venue is ordered to take place." This act

does not appear to authorize the Judges to do more than order the issue to be tried in another county; this could have been done, before the act, *by consent only*, and entering a suggestion on the roll, (Tidd, 606, citing 1 Wils. 298; *Groves v. Durall*, H. 38 G. 3, K. B.; and *Fonnereau v. Fonnereau*, K. B. MSS.), except in one instance, where a fair and impartial trial could not be had in the county where the venue was laid. (Tidd, 606, note (a). Now, under the act, any cause would be sufficient which shews that *delay* or *expense* would be avoided, and that it would be more *convenient* to have the trial in another county.

Platt.—By the affidavit it appears, that this is an action brought by the plaintiff to try the right of persons to erect booths on the *Epsom Downs*, in the county of *Surrey*; that the plaintiff was, in the last Parliament, a member for the county; and that he was a candidate in the recent election, in which he failed; but in the course of that election, in canvassing the whole of the county, he made many speeches, in which he introduced the subject of this action in a way which is considered likely to prejudice the defendant on the trial; who also swears that he cannot have a fair trial in that county.

A rule *nisi* for changing the venue having been granted—

Thesiger and *Comyn* shewed cause, upon affidavits, which shewed that the prejudice, if any, was rather against the plaintiff; because the effect of this action, if successful, would be to interfere with the *Epsom* races, which were very popular in the county: and that the speeches which were alleged to have been made respecting this action, were merely in consequence of questions respecting it which some of the constituents had thought proper to put to him.

Platt and *Butt* were heard in support of the rule.

LORD ABINGER, C. B.—There appears to me to be no ground for the motion.

The rest of the Court concurred.

Rule discharged—the costs to be costs in the cause.

1835.
BRISCOE
v.
ROBERTS.

1835.

TROUGHTON v. CRAVEN.

Where the defendant's residence is unknown, application must be made to the Court in the first instance for leave to serve the declaration in a particular manner: and if the declaration is left at the defendant's last place of abode, the Court will not afterwards declare such service to be good.

ARCHBOLD moved that the service of the declaration in this action should be deemed good service, and that the plaintiff might be entitled to sign judgment as for want of a plea. The defendant had changed his residence since the commencement of the action, and it was not known where he was gone; and the only service of the declaration had been by leaving it at the place at which the defendant last resided, but which he had then left, and by sticking up a copy in the office. He contended that, by the practice of the Court, such service was sufficient; and cited *Holstein v. Culliford* (a), and other cases, where the Court seemed to admit that service at the last place of abode was good service.

PARKE, B.—This is a case in which, if you had applied to the Court, they would have given you leave to serve the declaration by sticking it up in the office. I think that that was the course which ought to have been pursued.

ALDERSON, B.—The rule of *Hilary Term, 2 Will. 4, s. 49*, directs that where the residence of a defendant is unknown, the notice of declaration may be stuck up in the office; but not without previous leave of the Court. This rule, therefore, must be refused.

Rule refused.

(a) 1 Bos. & Pul. 214.

1835.

LESLIE v. DISNEY.

R. v. RICHARDS shewed cause against a rule which had been obtained by *Kelly*, for discharging the defendant out of custody, on the ground of his being privileged from arrest as *Somerset* herald, and liable to be called on by the King to do duty at any time. He contended that the motion could not be supported, on two grounds: *first*, that the defendant himself was not entitled to take the objection, for which he cited *Fisher v. Begrex (a)*. The other objection was, that the motion was out of time, the arrest having taken place on the 8th, and the application not being made till the 20th, and, therefore, too late. The rule in such cases is, that the application must be made promptly. The Crown makes no application, and there is no instance where such a privilege has been claimed for the *Somerset* herald.

The Court refused to interfere on motion for the purpose of relieving a defendant who had been held to bail, on the ground of his being the *Somerset* herald, and liable to be called on to attend the King, whenever and wherever he chose, it not appearing clearly by the affidavits what were the duties of his office, and no instance shewn of the claim being allowed.

Where there is any doubt, the rule is, to leave such persons to their writ of protection.

Kelly, contra.—The rule as to time does not apply to the case of a prisoner in actual custody, and it is not fit that such a case should be brought within the rule. The rule of Court (*b*) applies only to applications to set aside proceedings for irregularity. The affidavits on which the motion was made shew that the defendant is one of the King's servants in ordinary; that he wears a livery, and receives a quarterly salary and fees as a household servant; that it is his duty to attend the King whenever and wherever he may be required; that he is liable to attend at any moment, and has, in fact, often attended. The ground on which such a person is privileged from arrest is, the impropriety of detaining him, being one of the King's servants. It is further sworn, that, by a patent of the 13th

(a) 1 Cr. & M. 117; Ante, Vol. 1, p. 588, S. C.

(b) Reg. Gen. H. T. 2 W. 4, s. 33.

1835.
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 LESLIE
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of *September*, 1813, all rights, &c. of the *Somerset* herald were granted to the defendant. Though it does not appear that this privilege has been ever claimed in the case of the *Somerset* herald, because, perhaps, it has never been required, yet there is an instance of a similar privilege being claimed by the *Windsor* herald, and that he was discharged from arrest by the House of Lords. It occurred in the year 1693, and is to be found in vol. 15 of the *Lords' Journals*. The defendant is a necessary officer upon the occasion of an investiture of the order of the garter, and has personally attended both the late King and the present King.

PARKE, B.—The privilege is given to the servant on account of his constant attendance on the King; but I do not think that the affidavits explain with sufficient clearness what his duties are. We ought not to relieve on motion, except in a very clear case. That was the course adopted in *Luntley v. Battine (a)*, where a similar privilege was claimed for a gentleman of the privy chamber, and, there being a doubt about it, the Court would not interfere on motion, but left him to sue out his writ of privilege.

It is not clear that the defendant falls within the class of persons contemplated; if he is privileged by law, he can have his writ of protection.

ALDERSON, B.—Why should not a gentleman of the privy chamber be relieved as well as the *Somerset* herald? I think, as the Court put him to sue out his writ of privilege, we ought not to interfere in the present case.

Rule discharged (*b*).

(a) 2 B. & Ald. 234.

6 B. & C. 84; and Petersdorff's

(b) See also *Bidgood v. Davies*,

Law of Bail, p. 42, &c.

1835.

TYLER v. GREEN.

THIS was a rule to set aside the service of a writ of summons, for irregularity. The writ was indorsed, "This writ was issued by *Geo. Smith, 38, Chancery Lane, Worcester.*" No such place could be found.

A writ was served on the 25th of *October*. An application on the 3rd of *November*, to set aside the service for irregularity, (the 2nd being a *Sunday*), was held to be out of time, and that it should have been made on the 1st.

Chandless shewed cause, and objected that the application was too late. The writ was served on the 25th of *October* last, and this application was not made till the 3rd day of *November*. He cited *Cox v. Tulloch* (a), which decided that, where there is an irregularity in any proceeding had in vacation, and there is time in the course of that vacation to apply to a Judge at chambers, it is imperative upon the party complaining to do so, and he cannot wait to move to set aside the proceeding till the first four days of next term, though there has been no intermediate step taken; and in a note to that case, one is mentioned, where, in the *King's Bench Practice Court*, it was held by *Patteson, J.*, that where the writ was returnable on the 2nd of *November*, it was too late on the 10th to take advantage of a misnomer in the process. The objection here ought to have been made within the time for appearance.

Whateley, in support of the rule.—The motion was made on the first day of term, which was the 3rd of *November*, the 2nd being *Sunday*. The 25th was a *Saturday*, and the parties had to write into the country. In *Cox v. Tulloch*, there had been a delay of a month, and the other case cited appears to be only a loose note. This application was made on the first day of term.

PARKE, B.—We think you are too late. You should

(a) Ante, Vol. 2, p. 47.

1835.

TYLER
v.
GREEN.

have applied on the 1st of *November*; and therefore the rule must be discharged with costs.

Rule discharged.

DAVIS, Executor, v. STANBURY.

An affidavit, in support of a motion for entering up judgment on a warrant of attorney (given when no suit is pending) need not be entitled in any cause.

BUTT moved to enter up judgment on a warrant of attorney, which authorized judgment to be entered up at the suit of *J. Davis*, his executors or administrators. The affidavit was not entitled in the cause.

GURNEY, B. (a), said, that he had never known an instance of such a motion, where the affidavit was not entitled in the cause; and, on referring to the Master, his Lordship's opinion was confirmed.

Butt suggested that it could not be necessary to entitle the affidavit in a cause, as there was, in fact, no cause in existence; and that he understood the practice in the *King's Bench* was to enter up judgment on an affidavit like the present.

GURNEY, B.—The Master will inquire as to the practice; and if it be as you suggest, judgment may be entered up.

The Master, on inquiry, found the practice to be as stated, and judgment was entered up accordingly.

(a) Sitting alone.

1835.

REYNOLDS v. WELSH.

THE plaintiff, in the commencement of the declaration, which was in debt, described himself to be suing as assignee of *Wilson and Harmer*, late sheriffs, against the defendant, who had been summoned to answer the plaintiff, assignee as aforesaid, by virtue of a writ. The plaintiff then declared on a bond made *to himself*. The defendant demurred specially that the plaintiff was suing as assignee upon a bond made to himself.

A declaration in the commencement stated, that the defendant was summoned to answer the plaintiff assignee of certain sheriffs; but the bond declared on appeared to be made to the plaintiff personally:—*Held*, sufficient on special demurrer.

Channel, for the demurrer.—Before the Uniformity of Process Act, the writ was looked upon merely as a means of bringing the defendant into Court; now, it is the commencement of the action. A writ must now specify the true cause of action, and the declaration ought to correspond with the writ. By the statement at the commencement of the declaration, the writ appears to have been sued out for a different cause of action from that for which the plaintiff has declared.

PARKE, B.—The allegation is surplusage.

The other Barons concurred.

Judgment for the plaintiff (a).

Barstow, *contra*.

(a) See *Steward v. Layton*, ante, p. 430.

1835.

GRAY v. SHEPHERD.

An affidavit of debt, for goods sold and delivered to, and for money paid and laid out for, *S.*, the wife of the defendant, before his intermarriage with her:—*Heid*, insufficient.

MILLER shewed cause against a rule which had been obtained by *Addison*, for discharging the defendant out of custody on entering a common appearance, on the ground of the affidavit to hold to bail being defective. The affidavit of debt was for 130*l.*, for goods sold and delivered to, and for money paid and laid out for *Sarah*, the wife of the defendant, before her intermarriage with him. He referred to *Symonds v. Andrews* (a), where it was held that an affidavit that defendant was indebted to plaintiff for money paid (not saying by the plaintiff, or for the defendant's use), and for wages due for serving in a ship of which the defendant was part owner (not saying due from the defendant), was held sufficient. The late rule of Court (b), which directs that affidavits to hold to bail for money paid to the use of the defendant, or for work and labour done, shall not be deemed sufficient, unless they state the money to have been paid, or the work and labour to have been done at the request of the defendant, did not, he contended, apply to goods sold and delivered, nor to money paid for a third person, for which the defendant became answerable by such a change of circumstances, as, by the marriage of the defendant to the person for whom the money was paid.

PARKE, B.—A similar rule existed in practice long before that rule was issued. The rule must be absolute.

Rule absolute, with costs.—No action to be brought for false imprisonment, but the defendant to be at liberty to sue for a malicious arrest.

(a) 5 Taunt. 751.

(b) H. T. 2 W. 4, Rule 8.

1835.

CALL, Bart., and Another, v. THELWELL.

ADDISON moved to set aside the assignment of the bail-bond, and the subsequent proceedings in this action against the bail for irregularity, with costs, on the ground that the bail-bond was assigned too early. The bail-bond was dated *November 24*, and it recited that the defendant was arrested on the 17th. The present motion was grounded on an affidavit that the recital in the bond was false; that, in fact, no arrest at all was made; but that a letter was sent to the defendant on the 17th, and he gave a bail-bond on the 24th. It was contended, therefore, that the writ could not be said to be executed until the 24th, (in which case the proceedings on the bail-bond were taken too early); that notice of the writ being in the hands of the officer was not equivalent to an arrest; and that it had been decided that it did not amount to an arrest.

LORD ABINGER, C. B.—How came the defendant to give a bail-bond at all? he ought to have explained the circumstances.

Addison.—It is sworn that the bail-bond was not read over to him.

PARKE, B.—What day did the sheriff indorse as the day of the arrest? Suppose a letter sent, informing the defendant that a warrant was in the hands of the officer, and the defendant says, “do not execute the warrant, and I will give a bail-bond?”

Addison.—That would not be an arrest.

LORD ABINGER, C. B.—It was a voluntary act on the defendant's part to give a bail-bond; how can he after-

A bail-bond was given to the sheriff on the 24th of November, and it recited that the defendant had been arrested on the 17th: bail above not having been put in within due time after the 17th, the plaintiff took an assignment of the bail-bond. Upon motion to set aside the assignment as having been made too early, upon an affidavit that the recital in the bond was false—that, in fact, no arrest was made, but only a letter sent, and that therefore the writ could not be said to be executed till the 24th, when the bond was given, the Court refused to interfere.

1835.

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wards object? Is the plaintiff to lose his security, because the sheriff gave the defendant indulgence? Your affidavits at present do not shew sufficient to induce the Court to interfere.

The rule of *M.*, 59 G. 3, K. B., is now adopted into the practice of the Court of *Exchequer*; and, therefore, bail or sheriffs, applying for relief, must comply with the terms of that rule. An affidavit by bail, applying to stay proceedings on payment of costs, which stated that the application was made for their *own* indemnity, instead of *only* indemnity, was held insufficient.

The rule being refused, *Addison*, on a subsequent day, obtained a rule *nisi* on behalf of the bail, to stay the proceedings on the bail-bond, on payment of costs, bail above having justified.

Hughes shewed cause, and objected that the affidavit on which the rule was moved was insufficient, the rule of Court of *Michaelmas* Term, 59 *Geo.* 3, requiring the bail to swear that the motion was for their *only* indemnity, and the affidavit merely stating that it was for their *own* indemnity. He contended that the two expressions were materially different in their meaning, and cited *Rex v. The Sheriff of Surrey* (a).

Addison, *contra*, insisted that the affidavit was sufficient according to the practice of this Court, in which there was no such rule as that cited, which was only a rule of the *King's Bench*.

The Court, however, on reference to the Master, held, that the affidavit was insufficient, the meaning of the two expressions being different. The rule of the *King's Bench* of the 59 *Geo.* 3 had, they said, been adopted in this Court, and it was necessary that it should be strictly complied with (b). The Court, however, gave time to see if the affidavit could be amended, the plaintiff to be put in the same situation.

(a) Ante, p. 174.

(b) This decision overrules the

case of *Bourke v. Bourne*, ante, Vol. 2, p. 250.

The affidavit having been amended, *Hughes*, on a subsequent day, shewed cause on an affidavit, which stated that the action was on a bill of exchange against the acceptor; that the *capias* against the original defendant issued on the 12th of *November*, and that special bail not having been put in till the 1st of *December*, though the bail-bond recited that the arrest took place on the 17th of *November*, the plaintiff took an assignment of the bail-bond on the 6th of *December*, issued a writ on the 10th, and declared on the bail-bond against them and the original defendant on the 6th of *January*; and that, at the time the rule *nisi* was granted, the time for pleading had expired, and the defendants were under terms of pleading issuably, and taking short notice of trial; that notice having been given on the part of the defendant that the plaintiff's proceedings were irregular, and that bail above would justify on the first day of *Hilary* Term, and that a motion would then be made for setting aside all the proceedings with costs, the plaintiff's attorney requested that the question of irregularity might be at once determined by a Judge at chambers; and he then wrote to the undersheriff to ascertain when the arrest took place, who had written in answer that it took place on the 17th of *November*; the defendant's attorney, however, who was also the attorney for the bail, refused to go before a Judge at chambers. The plaintiff had not declared *de bene esse* in the original action; but it appeared that, in point of fact, so much time had elapsed that the plaintiff might have gone to trial if bail had been perfected in due time. The only question was, on what terms the proceedings were to be stayed. It was contended, on behalf of the plaintiff, that the bail-bond ought to stand as a security, or, at all events, that some terms ought to be imposed on the defendant to compel him to go to trial forthwith, so that the plaintiff might not be prejudiced by the delay; that the bail were bound to have applied to a Judge at chambers,

1835.

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A plaintiff can in no case have the bail-bond to stand as a security, (though it may clearly appear that, in point of fact, he has been prevented from going to trial by bail above not being perfected in due time), unless he has declared *de bene esse* against the original defendant; neither can the Court impose terms on the defendant, where the application is by *bail* to stay proceedings on payment of costs, bail above being perfected.

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instead of waiting till the term; and that they had thereby occasioned a delay of at least a month; and this circumstance was principally relied upon to take the case out of the common rule, which allowed proceedings to be set aside without the bail-bond standing as a security, unless the plaintiff has declared *de bene esse*; otherwise, it was urged, the bail might be guilty of any vexation, unless the plaintiff had put the defendant to the expense of a declaration *de bene esse*; and it was contended that there was no rule which made it imperative upon the Court to stay the proceedings in such case, without ordering the bail-bond to stand as a security, as the rule of *Hilary Term, 2 Will. 4, s. 5 (a)*, had no negative words, and did not apply to proceedings under the Uniformity of Process Act, as it mentions only process returnable in term; and the *4 & 5 Anne, c. 16, s. 20*, only enabled the Court to grant such relief as should be consistent with justice and reason (*b*); and as the bail had been guilty of vexatious delay, by which the plaintiff would be thrown over the whole of *Hilary Vacation*, the plaintiff ought not to suffer for it. He also referred to the practice as laid down in *Chitty's Archbold's (c)* and *Tidd's Practices (d)*, that terms may be imposed even where a trial has not been lost.

Addison, in support of the rule, was stopped by the Court.

PARKE, B.—It has been decided in so many cases, that, unless the plaintiff has declared *de bene esse*, he cannot be said to have lost a trial, that it is too late now to contest the question. Neither can we impose terms on the origi-

(a) Ante, Vol. 1, p. 199.

(b) See as to this *Key v. Hill*, 2 B. & Ald. 598.

(c) P. 146.

(d) 9th ed. pp. 300—302. See also Rules and Orders, K. B. Mich. 8 Anne, note (e).

nal defendant; for he is not a party to this rule, which is made on behalf of the bail only.

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Lord ABINGER, C. B.—The rule must be absolute upon payment of costs.

BOLLAND and GURNEY, Barons, concurred.

Rule absolute.

LEVY v. DUNCOMBE.

A RULE *nisi* had been obtained, at the instance of the plaintiff, for an attachment against his late attorney, for not having delivered a bill of costs, pursuant to a Judge's order for that purpose, and which had been made a rule of Court and personally served.

Where the party against whom a rule *nisi* for an attachment was obtained, appeared, and objected that the rule *nisi* had not been personally served, the Court, notwithstanding, made the rule absolute.

Humfrey and *Hughes* shewed cause, and objected, that the rule could not be made absolute, because the affidavit of service did not state that the rule *nisi* had been personally served, which, it was contended, was necessary; and there was an affidavit *contra*, that there had been no personal service. The 51st rule of *Hilary Term, 2 Will. 4*, and *Tidd*, 500, and *Weston v. Faulkener* (a), were cited.

Lord ABINGER, C. B.—The rule *nisi* is served merely for the purpose of bringing the party here; if he appears, as he does here, by his counsel, that obviates the necessity of inquiring whether the service of the rule *nisi* was personal or not; though, if no one had appeared, the Court would probably not have made the rule absolute for an at-

(a) 2 Price, 2.

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tachment, except on an affidavit of personal service. The contempt for which the attachment is prayed was in not obeying a previous rule, which has been personally served.

PARKE, BOLLAND, and GURNEY, Barons, concurred.

The merits were not gone into, all matters in difference being referred to the Master; and it was ordered that the attachment should not be drawn up for a month.

Rule absolute accordingly (a).

Thesiger and *Butt*, in support of the rule.

(a) This decision seems at variance with the case of *Wood v. Critchfield*, ante, Vol. 1, p. 587; 1 Cr. & M. 72, S. C. There an imperfect copy of a rule nisi was served (there being no title of the cause at the top), and counsel appeared to shew cause and made the objection; and it was held that he was bound to come and take the

objection, and did not, by appearing, admit that he was rightly brought into Court. So in *Clothier v. Est*, ante, Vol. 2, p. 731, it was held that appearing and using affidavits, in opposition to a rule, did not waive an objection to the title of the affidavit on which the rule was moved.

BYRN v. Dr. DIBDIN.

One of the King's chaplains being arrested for debt, and having given bail, the Court, on motion, directed the bail-bond to be delivered up to be cancelled.

BUSBY shewed cause against a rule which had been obtained by *Bompas*, Serjt., for cancelling the bail-bond given by the defendant, on the ground that he was privileged from arrest, as being one of the King's chaplains, at a yearly salary, and liable to be called on to do duty at any time. The affidavits in answer alleged that the defendant was the rector of a living near *Newmarket*, and had not been known to do duty before his Majesty more than once

in the last two years and a half. It was contended that the King's chaplain was not *quod* chaplain privileged at all times. He referred to *King v. Foster* (a), and *Forster v. Hopkins* (b), as authorities to shew that the employment of the defendant must be a *bond fide* employment about the King, and not merely occasional or colourable. In the recent cases of privilege, particularly in *Luntley v. Battine* (c), the Court has refused to interfere where the question of privilege is at all doubtful: that was the case of a gentleman of the privy chamber, and *Abbott, C. J.*, in his judgment, alludes to the proclamation which was issued on the accession of his late Majesty, requiring sheriffs and officers to take notice of the privilege which his servants in ordinary with fee are entitled to, in respect (as it is said) of their constant attendance on the King; and after alluding to the rule laid down in *Colonel Pitt's case* (d), and relied on by Lord *Kenyon* in *Bartlett v. Hebbes* (e), that the Court is at liberty to exercise a discretion in granting or refusing a discharge, especially where there is any doubt whether the party applying be really such a person as is entitled to the privilege, or there are any other unfavourable or suspicious circumstances, his Lordship proceeds thus:—"As there is, therefore, no great necessity for the service of these officers, the occasions being but rare when they are called upon, and when they occur not requiring the attendance of them all, I do not think that any inconvenience will result to his Majesty's service by our leaving the defendant to sue out his writ of privilege." That principle was acted upon in a case which occurred in this Court, in the last term, of *Leslie v. Disney* (f), where the Court refused to discharge the *Somerset* herald on motion,

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(a) 2 Taunt. 167.

(b) 2 Chit. Rep. 46.

(c) 2 B. & Ald. 234.

(d) 2 Str. 985.

(e) 5 T. R. 686.

(f) Not then reported. See the case, ante, p. 437.

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and that principle applies with great force to the present case, as it is sworn that only one instance has occurred of the defendant's officiating before the King.

PARKE, B.—In *Leslie v. Disney* the defendant was not a servant in ordinary with fee; but a chaplain is.

LORD ABINGER, C. B.—A chaplain is liable to be called on at all times; and if he could be arrested, the King could not have his services.

Busby.—It lies on the defendant to make out a clear case of privilege. Here the defendant is sworn to have a living at a great distance off, and it is his duty to reside on the living unless he be in actual attendance on the King, or he would be liable to the penalties of the Non-residence Act (a); he could not, therefore, be in constant attendance on the King; and it appears that his services have not, in fact, been required for several years.

The Court, without calling on *Bompas*, Serjt., who was to have supported the rule, made it absolute.

Rule absolute.

(a) 57 G. 3, c. 99, s. 5.

ALDRIDGE v. BARRY, commonly called Lord TULLAMORE (a).

A lord of the
bedchamber is
privileged from
arrest.

THIS defendant having been arrested for a debt of 1300*l.*, a summons was taken out for discharging him from custody, on an affidavit, that, on the 1st of *December* last, he was appointed one of the lords of the bedchamber to the King, with a salary of 1000*l.* a-year, and that he was liable to be called on to attend the King at any time, and that the duties of his office could not be performed by deputy.

(a) At Chambers, Feb. 10th, 1835, *coram* Park, J.

Hughes opposed his discharge, on the ground that the affidavit did not shew what were the duties of his situation, nor that he had ever been called on to do any, and that the appointment was merely colourable to screen him from his debts; and also upon an affidavit which shewed that the affidavit of debt was made before the appointment of the defendant, and that there were eight lords of the bedchamber, and only one or two attended at a time. He relied on *Leslie v. Disney* and *Luntley v. Battine*; but

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PARKE, J., (after observing that he had consulted the other Judges of the Court), said, there could be no doubt that a lord of the bedchamber was privileged from arrest; his duties were immediately about the person of the King; he therefore came within the description of a servant in ordinary with fee; that *Luntley v. Battine* was a very different case, and that the present could not be distinguished from *Byrn v. Dr. Dibdin*. His lordship made an order for his discharge without costs, the defendant putting in a common appearance, and undertaking to bring no action.

Petersdorff appeared for the defendant.

HARRIS v. PARKER.

MANSEL moved to discharge the defendant out of custody, he having been in prison for twelve months for a debt under 20*l*. The action was in debt, and the judgment was for 100*l*. The real debt was alleged to be only 18*l*. 10*s*., and the execution was for that sum; but it was doubted whether, the judgment being for 100*l*., it ought not previously to be reduced to the real debt.

Though the judgment is in debt for 100*l*., yet if the execution against the defendant is for less than 20*l*., the defendant may be discharged out of custody, after being in prison 12 months, without reducing the judgment.

PARKE, B.—The defendant is within the act, and I think there is no occasion to reduce the judgment.

Rule absolute.

1835.

NAYLOR's Bail.

An affidavit of justification of bail, which merely states the bail "possessed" instead of "worth," will not be allowed to be amended.

ROBINSON opposed these bail on the ground that the affidavit of justification did not state that the bail were "worth" the necessary amount of property, but only "possessed."

Henry, admitting the validity of the objection, applied for time to amend.

PARKE, B.—It has been for two terms the practice to refuse such an application.

GURNEY, B.—Two terms ago, notice was given that such an amendment would not be allowed in future.

Henry cited *Rogers v. Jones* (a), in which time was allowed to amend the affidavit; and it had been doubted, he said, whether the rule applied at all to country bail.

Robinson, contra, cited the case of *Worlinson's Bail* (b), in which case it was intimated, that in future such an amendment would not be allowed.

PARKE, B.—We cannot allow this amendment. On making an affidavit of merits, and payment of costs, you may apply to stay proceedings.

Bail rejected.

(a) Ante, Vol. 1, p. 704.

(b) Ante, Vol. 2, p. 53.

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REYNOLDS v. IVEY.

ASSUMPSIT by the indorsee against the acceptor of a bill of exchange. Plea, that there was not at any time any consideration for his the defendant's accepting or paying the said bill of exchange, or any part thereof. Special demurrer, assigning for cause that the plea was no answer to an action by an indorsee.

In an action by an indorsee against the acceptor of a bill of exchange, a plea that there was not at any time any consideration for his the said defendant's acceptance or paying the said bill of exchange, was held bad on special demurrer.

Dwarris, in support of the demurrer, cited *Dome v. Chelford*(a).

The Court then called upon

Mansel, to support the plea.—The allegation that there was no consideration for the payment of the bill must be taken to mean, not only that the defendant had no consideration, but also that the plaintiff had not given value; for if he had, there would, in fact, be a consideration for the payment; and if issue had been taken on the plea, it must have been found against the defendant.

LORD ABINGER, C. B.—We must take the plea to mean that the acceptor had had no consideration.

PARKE, B.—The plea does not exclude the case of the plaintiff having given a valuable consideration for the indorsement to him, and the indorsement is *prima facie* evidence that he had.

Judgment for plaintiff on demurrer—the Court refusing leave to amend.

(a) 5 M. & Scott, 97.

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CLARKE and Another v. NICHOLSON.

Where a sheriff seizes and sells goods under an execution, and it afterwards appears that the sheriff was not warranted in levying on the goods, in consequence of which an action of trover is brought against the sheriff, the jury, in estimating the damages, may deduct the costs and expenses necessarily incurred by the sheriff in bringing the goods to a sale.

R. V. RICHARDS moved to set aside the verdict for the defendant, and enter a verdict for the plaintiff for 6*l*. It was an action of trover brought by the plaintiffs as assignees of a bankrupt, to recover from the defendant, the late sheriff of *Surrey*, the value of goods which belonged to the plaintiffs as assignees, and which had been improperly seized and sold by the defendant under an execution against the bankrupt. The defendant pleaded payment of money into Court (*a*), which included the poundage. The plaintiffs replied that they had sustained more damages; and the only question was, whether, as the goods appeared clearly to belong to the assignees, the jury, in estimating the amount of damages, could deduct the costs and charges attending the seizing and sale of the property. He contended that the plaintiffs were entitled either to the goods or to their value, and that the jury were not warranted in deducting the expenses of the sale. He relied upon *Glasspool v. Young* (*b*), where it was held that the plaintiff, whose goods had been improperly seized and sold under an execution against a person who had been living with her as her husband, but who afterwards turned out to be married to another woman, might recover in trover against the sheriff the full value of the goods, though it exceeded considerably the sum for which they were sold under the execution. As the goods here were wrongfully seized, the plaintiffs were entitled to recover the full value of them without the deduction of the 6*l*.

Lord ABINGER, C. B.—The course usually is, for the jury to make an allowance for such costs as would be necessarily incurred in bringing the goods to a sale. If it

(*a*) Under the 3 & 4 W. 4, c. 42. (*b*) 9 Barn. & Cres. 696.

had been laid down as a point of law to the jury that they were bound to make such an allowance, such a direction could not be sustained; but that was not so. It was properly left as a question of damages for the consideration of the jury.

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GURNEY, B.—Almost the only case I know in which the sheriff was not allowed such expenses was, where notice was given to him that the goods might be advantageously sold by private contract, and in defiance of that he proceeded by public auction.

PARKE, B.—I was quite satisfied with the verdict, and gave no leave to move.

Rule refused.

HOWORTH v. HUBBERSTY.

IN this case a rule *nisi* had been obtained by *Tomlinson*, to set aside a demurrer by the defendant as irregular, and that the plaintiff might sign judgment as for want of a plea. The application was founded on the rule of *Hil. 4 Will. 4* (s. 2). The declaration was in *assumpsit* on a promissory note, and the defendant pleaded that there never was any consideration for giving the note; and the plaintiff replied that there was a consideration, and concluded to the country. The defendant specially demurred to the replication for not setting forth the particulars of the consideration, and for not concluding with a verification.

An affidavit with the word "said" instead of "saith" is insufficient.

A rule *nisi* for setting aside a demurrer as being frivolous, should be drawn up on reading the pleadings.

Manuel shewed cause, and objected to the affidavit upon which the rule was obtained, and which ran thus:—"This deponent 'said,'" instead of "saith."

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PARKE, B.—Perhaps there are sufficient materials to support the rule without using that part of the affidavit.

Tomlinson, in support of the rule, said, that the objection sufficiently appeared on the pleadings; but it appeared the rule had been drawn up on reading the affidavit only, and

The Court, holding that they could not look at the record, discharged the rule without costs.

Rule discharged, without costs.

JACOB v. HUNGATE.

A rule for an attachment against a witness will be discharged with costs, if it is denied that the original was shewn at the time of service.

No conduct money need be tendered to a witness in town in a town cause.

The alteration of a figure in the date of an affidavit in the *jurat*, by writing one figure over another, does not constitute an erasure or interlineation within the meaning of the rule.

A RULE *nisi* had been obtained by *Mansel*, for an attachment against a witness of the name of *Mary Hughes*, for not attending at the trial of this cause in pursuance of a *subpoena* served upon her.

Steer shewed cause, upon an affidavit which alleged that the original *subpoena* was not shewn to her at the time of service, and that no conduct money was tendered. It was a town cause.

Mansel objected to this affidavit, on the ground of an erasure in the *jurat*; the real date was *January 31*, but the 3 appeared to have been written over a 2, and it was not very plain what figure it was.

PARKE, B., (having looked at the affidavit), said, that it was neither an erasure nor an interlineation.

Lord ABINGER, C. B.—In a town cause no conduct mo-

ney is required; but as the witness denies that the original was shewn, the rule must be discharged.

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Rule discharged with costs.

HOWORTH v. HUBBERSTY.

MANSEL had obtained a rule *nisi* for the costs of the day for appearing to argue against a demurrer to a replication, but which could not be heard on account of there being no joinder in demurrer, and the plaintiff not having delivered the demurrer book to the defendant or the Judges(a).

Tomlinson shewed cause upon an affidavit that there was no joinder in demurrer, and that, therefore, the defendant had no right to come to argue a demurrer which was in fact not ripe for argument. He admitted that the case had been entered; but that, he said, was only out of caution.

Mansel, contra.—As the case was in the paper, we were therefore bound to appear. Notice in the paper was notice *per se* to all persons that the plaintiff intended to proceed.

PARKE, B.—The defendant could not have been misled, because he must have known that it could have been of no use to put the case in the paper when there was no joinder in demurrer. The rule must be discharged.

Rule discharged with costs.

A cause was entered in the paper for argument. A defendant having demurred to a replication, the plaintiff got the case put into the paper as for argument, and the defendant came prepared to argue the point; but it appeared that the plaintiff had not joined in demurrer, and of course no proper books were delivered to the Judges:—*Held*, that the defendant was not entitled to his costs of appearing for argument.

(a) See R. G. H. 4 W. 4, s. 7, ante, Vol. 2, p. 305.

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PREEDY v. MACFARLANE.

A defendant was arrested upon a writ, in which the sum of 37*l.* was by mistake inserted as the sum for which bail was to be taken; but upon the back of the writ the plaintiff demanded 27*l.* only, which was the amount really claimed. The officer was informed of the mistake, and desired to arrest for the smaller sum. The defendant was arrested and sent to prison; and the plaintiff, at the trial, made out a claim to the extent of 28*l.*: but there being no count in the declaration to warrant part of the demand, he agreed to forego that part to prevent further litigation, and take a verdict for 20*l.* only. The Court, under these circumstances, refused to allow the defendant his costs under the 43 *Geo.* 3, c. 46, s. 3.

THIS was an action by the plaintiff for surgical and medical attendance upon the defendant and his family, and also for their board and lodging. The affidavit of debt was for 27*l.* for board and lodging, but there was no count for board and lodging in the declaration. Three writs were issued against the defendant into different counties: the one on which the defendant was arrested was by mistake indorsed "bail for 37*l.* 10*s.* by affidavit;" but the claim was stated thus: "The plaintiff claims 27*l.* for debt and 4*l.* 4*s.* for costs, &c." The officer observed the variance when the writ was put into his hands, and he was told that it was a mistake, and that he was only to arrest for the 27*l.* At the trial proof was given to the extent of 28*l.*, but it was discovered, that the claim for board and lodging could not be gone into, in consequence of there being no count in the declaration to meet it. The verdict for 20*l.* was, to prevent further litigation, taken by the plaintiff. A rule *nisi* was afterwards moved for by *Price*, in order to give the defendant his costs under the 43 *Geo.* 3, c. 46, s. 3, by reason of the plaintiff not having recovered the sum for which he arrested the defendant, or for a new trial.

GURNEY, B.—You cannot move for both.

ALDERSON, B.—You purpose to reduce the verdict still more: perhaps as it at present stands the Court might not think you entitled to a rule under the 43 *Geo.* 3, but might when reduced.

Price then moved for a new trial, which was refused: he then applied under the 43 *Geo.* 3, and the Court granted a rule *nisi*.

Jervis shewed cause upon an affidavit of the plain-

tiff and the sheriff's officer, which alleged that the arrest was in fact made for 27*l.* only; that the defendant never gave bail; and that the whole of that sum would have been recovered if the plaintiff could have given in evidence his demand for board and lodging; and that the plaintiff had agreed to take 20*l.* to avoid further litigation.

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Price in support of the rule.—The particulars of demand were for 32*l.* 19*s.* 6*d.*; and the precipe was for 37*l.*

The Court held that he could not refer to the particulars, though annexed to the record, because they had not been used at the trial, and the precipe was not referred to in the affidavit.

Price then contended that the writ being for 37*l.* it was the duty of the officer to detain the defendant until bail was given for the full amount. Part of the demand was for 2*l.* 2*s.* for attending as a witness on a criminal charge, which, it was admitted, could not be sustained. If a party arrests for more than he recovers (though without malice or vexation), he comes within the act. The words of the act are imperative; and the Court has no discretion. The amount recovered is what is always looked to; and if that is materially less than the sum for which the arrest is made, the defendant is entitled to his costs.

LORD ABINGER, C. B.—I am of opinion that the rule ought to be discharged. The practice of all the Courts has been to inquire whether there was any reasonable or probable cause for the arrest for the larger sum. If a man is arrested and lies in gaol, I think he is as much within the words of the act as if he had given bail. The arrest here was, I think, for 27*l.* only, and not for 37*l.*; and then the question is, whether 27*l.* is too much? That depends on the second part of the clause, which is by way

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of proviso, that it shall be made appear to the satisfaction of the Court that the plaintiff had no reasonable or probable cause for holding the defendant to bail for the larger sum. The jury thought that 28*l.* were due; but as there was no count in the declaration under which part of the demand could be recovered, the plaintiff was obliged to forego a part and take a verdict for only 20*l.* Under these circumstances I think the rule ought to be discharged.

The rest of the Court concurred.

Rule discharged with costs.

ON a subsequent day *Price* renewed his application under the 43 *Geo. 3.*, or to have a suggestion entered on the record upon additional affidavits. The officer now swore that he arrested the defendant for the whole sum of 37*l.*, and that he thought he could not have taken bail for less.

PARKE, B.—The case was disposed of on the former occasion. Parties ought to come prepared with proper affidavits in the first instance. Only 27*l.* was inserted on the back of the writ, and 37*l.* was put in by mistake. The officer would have done very wrong if he had required bail for the larger sum. If the defendant had been ready with bail for 27*l.*, no inconvenience would have been suffered: but he never tendered any amount of bail. This is clearly not a case within the act, and the rule must be refused.

1835.

TAYLOR v. HILARY.

DECLARATION in *assumpsit* stated, "that in consideration that the plaintiff at the request of the defendant would allow one *H. H.* to have goods as he might want them not exceeding in the whole 200*l.*, the defendant promised the plaintiff to guarantee the payment of such goods. The defendant pleaded, that, after the making of the promise and undertaking, and before any breach thereof, to wit, on &c., it was, at the special instance and request of the plaintiff, agreed by and between the plaintiff and defendant, that the plaintiff should supply to the said *H. H.* 200*l.* worth of goods as he should want them, and that such goods should be paid for at the end of three months by a joint bill at four months, accepted by the defendant, which agreement of the defendant he, the plaintiff, before any breach of the promise and undertaking in the declaration mentioned, accepted, in full discharge of that promise and undertaking; and thereby then wholly released and discharged the defendant from the further performance of that promise and undertaking, and this the defendant is ready to verify." Demurrer, assigning for special causes that there was no material difference between the agreement set out in the declaration and that in the plea, and that the only difference appeared to be in the time of credit to be given; and that it did not appear by the plea but that the agreement therein mentioned had been fully carried into effect by the plaintiff, and the time of credit expired.

To *assumpsit* upon an agreement to guarantee the payment of goods supplied to a third person, the defendant pleaded, that, after that agreement was made, and before any breach, the defendant agreed with the plaintiff to pay for any goods supplied, by accepting a bill at three months: upon demurrer, assigning for cause that the agreement was not alleged in the plea to be in writing, and that it only varied the time of payment stated in the declaration:—*Held*, that the plea was sufficient.

Quære, whether in an action for goods sold it can be shewn under the general issue that the time of credit has not expired?

Barstow, in support of the demurrer, contended, *first*, that the plea was bad in not shewing that the agreement was in writing, and cited *Case v. Barber (a)*; and, *secondly*, that the agreement stated in the plea was inconsistent with

(a) T. Raym. 450.

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that stated in the declaration; the agreement stated in the plea only varying in the time and mode of payment.

Crowder, contra, contended, that the defendant could not have availed himself of the defence unless it had been pleaded; and he referred to a late case in the *King's Bench*, of *Edwards v. Harris* (a), in which it was held that in an action for goods sold and delivered, it must be specially pleaded that the time of credit has not expired.

PARKE, B.—I doubt about that: because, if it appears that the contract was to pay at a certain time, which has not expired at the time the action was commenced, the plaintiff does not make out his case. Here the agreement stated in the plea varies materially from that in the declaration: by the first agreement, the defendant undertakes merely to guarantee; by the second, he makes himself primarily and absolutely liable. You should have declared on the new agreement: you contend that you cannot, because it is not in writing; but is that necessary?

LORD ABINGER, C. B.—Before any goods were supplied on the first agreement, it was abandoned.

The Court expressing a strong opinion in favour of the plea, *Barstow* elected to withdraw his demurrer, and amend.

Leave to amend.

(a) Since reported, 4 Nev. & M. 182.

1835.

PRICE v. DAY and Others.

CHANNELL moved that the bail-bond should be given up to be cancelled, under these circumstances. The defendant was first arrested on the 24th, and an undertaking was given to put in bail; but notice being given to the plaintiff of an irregularity in the proceedings, he took out a rule to discontinue on payment of costs, and the costs were paid. The defendant was again arrested, by leave of a Judge, on a second writ; and the sheriff, it was alleged, detained him on both writs, from *Saturday* until *Monday*, not having had notice of the discontinuance of the first action. This motion was to set aside the bail-bond given on the second arrest, on the ground that the plaintiff had not done all that he ought to put an end to the first action, because he had not given notice to the sheriff. The defendant, it was urged, might have been put to a great inconvenience.

PARKE, B.—It was not necessary to give notice. All we could do would be to relieve you from the effects of the wrongful detainer on the first writ.

It appeared, however, that, before any bail was tendered, the rule to discontinue came in; and

Per Curiam.—As you have suffered no inconvenience, there is no ground for the motion.

Rule refused.

A defendant having been arrested, the plaintiff, on the ground of some irregularity, discontinued the action, and paid the costs. He again arrested the defendant by leave of a Judge, and the sheriff, not having had notice of the discontinuance of the first action, detained the defendant for some time on both writs; but it appeared that the defendant had in fact suffered no inconvenience, as, before he tendered bail on the second writ, the sheriff had notice served on him of the discontinuance of the first action. The Court, under these circumstances, refused to interfere, or to order the bail-bond to be cancelled, on the ground that the first action was not completely discontinued.

1835.

ARNELL *v.* WEATHERBY.

A mistake in a *ca. sa.* in stating the amount recovered, may be amended on payment of costs.

A RULE *nisi* having been obtained by *Mansel*, for setting aside the writ of *ca. sa.* issued against the defendant, and for discharging the defendant out of custody, with costs to be paid by the plaintiff, on the ground that it was stated in the *ca. sa.* that the sum recovered by the plaintiff was 100*l.*, whereas the judgment was in fact for the sum of 88*l.* only, that being the amount of the damages and costs—

Fish moved for and obtained a rule, calling on the defendant to shew cause why the *ca. sa.* should not be amended, upon an affidavit, which stated, that although the sum of 100*l.* had been inserted in the body of the *ca. sa.* by mistake, the *ca. sa.* had been properly indorsed for the sum of 88*l.*, and the defendant had been taken in execution for that sum only.

The Court directed both rules to come on together.

Fish now shewed cause against the rule for setting aside the *ca. sa.*; and—after objecting that it did not sufficiently appear on the face of the affidavit on which the rule had been obtained, that the application had been made under the authority of the defendant, the affidavit purporting to be made merely by “*R. F. Thompson*, of *H.*, gentleman,” without stating him to be “attorney for the defendant;” and further, that the application to the Court was too late, it not having been made until the 22nd of *January*, the defendant having been taken in execution on the 6th, and the 1st day of Term being the 12th—contended that the rule must be discharged, upon the ground that the writ had been properly indorsed for the sum of 88*l.* only; and that the officer, on executing

the writ, would be governed by the indorsement; and it was clear, that the defendant had been in no respect prejudiced by the mistake. He also contended, that the rule for amending the *ca. sa.* should be made absolute without payment of costs; and he cited three cases in which the Court had permitted the plaintiff to amend the *ca. sa.* after execution, without payment of costs: *Lawrence v. Wasborough* (a), *Newnham v. Law* (b), and *Shaw v. Maxwell* (c).

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Mansel was heard on the other side.

The Court, without noticing the objections as to the application for setting aside the *ca. sa.* being made without sufficient authority and as being made out of time, discharged the rule for setting aside the *ca. sa.* without costs, and ordered the rule for amending the *ca. sa.* to be made absolute upon payment of costs.

(a) 2 T. R. 737.

Chit. R. 349; Tidd, 1028; *McCormack v. Melton*, 1 Ad. & Ell. 331.

(b) 5 T. R. 577.

(c) 6 T. R. 458. See also 1

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THIS was an action of *assumpsit*, brought by the plaintiffs as executors, to recover a sum of money from the defendant, which was alleged to be due to the testator in his

The 3 & 4 Will.
 4, c. 42, s. 31,
 applies to those
 cases only
 where an exe-
 cutor before the

act was not liable to costs.

An executor plaintiff on a verdict against him, who applies to be relieved from costs under that act on special grounds, ought to do so in the first instance, for the Master is correct in taxing costs to the defendant in the usual way; and therefore, where there were several counts in a declaration by executors, some on promises to the testator, and some on promises to the executors, and the defendant having got a verdict, the Master taxed to him the whole costs of the cause, and the plaintiff then applied to have the Master's taxation reviewed, the Court would only do so on the terms of his paying the costs of the motion, though the defendant gave up the costs of those counts in which the promises were laid to the testator.

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lifetime. The action was commenced on the 27th *October*, 1832. The declaration, which was delivered on the 14th of *November* following, contained, *first*, counts for goods sold, and for money paid to the testator, and on an account stated between the defendant and the testator, which laid the promise to have been made to the testator in his lifetime; *secondly*, counts for goods sold, and money paid by the testator, with a promise to the plaintiffs as executors; and, *lastly*, a count on an account stated between the plaintiffs as executors and the defendant, with a promise to the plaintiffs as executors. The cause did not come on for trial till the 1st of *July*, 1833, when it was referred by consent to two arbitrators, or, in case of their disagreement, to an umpire; who ultimately made his award on the 15th of *April*, 1834:—That the plaintiffs had at the time of the commencement of the suit no cause of action against the defendant, in respect of the matters referred; and he directed that a verdict should be entered for the defendant; and he further awarded, that at the time of the death of the testator, he, the testator, was indebted to the defendant in the sum of 7*l.* 0*s.* 2*d.*; and he directed that the plaintiffs should, on notice of the award, pay that sum to the defendant, and that the plaintiffs should bear their costs occasioned by the reference; and the defendant should bear his costs occasioned by the reference.—The order of *Nisi Prius* was in the usual terms; one of which was as follows:—"It is likewise ordered, by and with the like consent, that the costs of the cause shall abide the event and the termination of the said award." It appeared from the affidavits, that before the reference was gone into, there had been a discussion between the attornies on both sides, whether there ought not to be some alteration in the terms of the order as to the costs, as the plaintiffs were suing as executors; but no alteration was made. An ineffectual attempt was made to set aside this award; but the rule for

setting it aside was discharged (a). The Master, in taxing the costs, taxed the whole costs of the cause to the defendant.

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Kelly moved for a rule calling on the defendant to shew cause why the Master's taxation should not be reviewed, and why the Master should not disallow to the defendant the costs of the trial, or why the costs should not be confined to the last count of the declaration. Upon the first point, he relied on the late statute of 3 & 4 Will. 4, c. 42, s. 31, which directs, "that in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall, *unless the Court in which such action is brought, or a judge of any of the said superior Courts, shall otherwise order*, be liable to pay costs to the defendant in case of being nonsuited, or a verdict passing against the plaintiff; and in all other cases in which he would be liable, if such plaintiff were suing in his own right, upon a cause of action accruing to himself." The act, though it was not dated till August 14th, 1833, was directed by the 44th section to commence and take effect on the 1st of June previous (b); and it had been held in three cases, decided in the different Courts, that the act was retrospective in its operation. *Freeman v. Moyes* (c), *Lysons v. Barrow* (d), and *Pickup v. Wharton* (e). He contended, that, under that act (if the statute applied to the present case) the Court under the circumstances would exercise their discretion by disallowing costs to the defendant; and that at

(a) See *Ashton v. Poynter*, ante, Vol. 2, p. 651, and Vol. 3, p. 201.

(b) Mr. Baron *Parke*, with reference to this inconsistency in the act, said, that the bill had been introduced very early in the session, and that the 1st of June was put in upon a supposition that the act would have passed several

months before it actually did, but that it had been delayed in the Commons.

(c) 3 Nev. & Mann. 883; 1 Ad. & Ell. 338. S. C.

(d) 4 Moore & Scott, 463; 10 Bing. 563. S. C.

(e) 2 Crom. & Mee. 406.

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all events, according to the law as it stood before that act, the defendant ought only to have had the costs of the last count taxed to him; for which he cited *Johnson v. Forster* (a).

PARKE, B.—Does that clause of the act deprive the defendant of costs in a case where before the act he would have been clearly entitled to his costs, under the statute of *Henry* the 8th? From the recollection I have of this particular case, I think the executors had a fair right to litigate. The intention of the act was, to make an executor more liable than he was before; and the only question is, whether it has succeeded in so doing.

ALDERSON, B.—The act says, that the executors shall be liable, *unless*, &c.; and not that he shall not be liable, *if*.

Kelly.—In *Lysons v. Barrow*, the plaintiffs sued as executors; but the cause of action had accrued to them since the testator's death, and they were nonsuited. The Court of *Common Pleas* held, that they had power under that act to order a judgment to be entered up for the defendant without costs, it appearing to be the plaintiff's duty to attempt the recovery of the money.

PARKE, B.—But for that case, I should have thought that there had been no ground for the rule; but, upon the authority of that case, take a rule.

Alexander shewed cause.—After the cases of *Dowbiggen v. Harrison* (b), *Jobson v. Forster* (c), and *Slater v. Lawson* (d), it is too late to contend that the defendant is not entitled to his costs upon those counts at least of the declaration in which the promise is laid to the plaintiffs as executors. With respect to the 3 & 4 *Will* 4, c.

(a) 1 B. & Ad. 6.

(b) 9 B. & C. 666.

(c) 1 Barn. & Adol. 6.

(d) *Id.* 893.

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42, s. 31, it is submitted that that clause cannot affect the present case: the act is cumulative upon a defendant's rights as they previously existed, and is affirmative in its terms, and can only apply to those cases where previously to the statute the executor would not have been liable. *Dr. Foster's case (a)*. It only applies to cases where the cause of action was complete at the testator's death. The section may be divided into two parts: the first part makes an executor liable to costs, in case of being nonsuited or a verdict passing against him, unless the Court otherwise order; but it makes him absolutely liable in all other cases in which he would be so if he were suing in his own right upon a cause of action accruing to himself: it therefore could not have been intended to apply to the latter counts of the declaration, where it appears the promise was not made till after the testator's death, and therefore the cause of action was not complete till then, but only to those counts where the promise is laid to have been to the testator, and where the executor necessarily sued in his representative character. In *Lysons v. Barrow (b)*, the point does not seem to have been taken that it was a case to which the act did not apply.

PARKE, B.—The objection appears to have been taken by counsel, but not considered by the Court. It was not an action on a policy of insurance, but for money had and received; but it appears that the Court were of opinion that the plaintiffs in that case were bound to sue as executors, and that they had no *locus standi* in Court except as such, because they expressly say, that no contract was made with them individually, but only as representing the testator.

Alexander.—The cause of action there appears to have accrued after the testator's death. In the subsequent case

(a) 11 Co. 61; Gale, 70. (b) 10 Bing. 563; 4 M. & S. 463. S. C.

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In *assumpsit* on a bill of exchange by the indorsee against the immediate indorser, the defendant pleaded that he indorsed the bill to the plaintiff without *having or receiving* any consideration: upon which the plaintiff took issue in the terms of the plea. After verdict for the defendant, the plaintiff moved for judgment *non obstante veredicto*, on account of the insufficiency of the plea:—
Held, that the plea was good after verdict, though it might have been objected to on special demurrer.

ASSUMPSIT.—*First* count by the first indorsee against the drawer and indorser of a bill of exchange for 100*l.*, dated *May* 15th, 1832, at four months after date, and drawn on and accepted by *Peter Maddocks*. *Second* count, on an account stated. The defendant pleaded to the first count—*first*, that he indorsed the bill to the plaintiff *without having or receiving* any value or consideration whatsoever for or in respect of the said indorsement thereof, and that the defendant had not at any time *had or received* any value or consideration whatsoever for or in respect of such indorsement. *Secondly*, that, after the making of the promises, so far as the same relate to the said bill of exchange in the said first count mentioned, and before the commencement of this suit, to wit, on the 18th day of *September*, 1832, *he the defendant paid to the plaintiff* the amount of the said bill of exchange, and the defendant then accepted and received the same in full satisfaction and discharge thereof, and of all damages in respect thereof. *Thirdly*, that, after the said bill became due, and was so presented as aforesaid, to wit, on the 19th day of *September*, in the year aforesaid, *the said Peter Maddocks paid to the plaintiff* 50*l.*, on account of, and in part payment of, the said bill, which the plaintiff then accepted and received, in full satisfaction and discharge of 50*l.*, parcel of the said sum of money in the said bill specified, and the defendant then paid to the plaintiff the residue of the amount of the said bill of exchange, which the plaintiff then accepted and received, in full satisfaction and discharge of the said bill of exchange, and of all damages in respect thereof, and of all claim whatsoever thereupon, against the said defendant. *Fourthly*, to the last count—*non assumpsit*.

The plaintiff *replied*, to the first plea, “that the de-

fendant heretofore, and at the time of indorsing the said bill to the plaintiff, as in the said declaration is mentioned, to wit, on the same day and year in the said declaration in that behalf mentioned, *had and received* from the plaintiff a good and sufficient consideration for and in respect of the said indorsement of the said bill to him the plaintiff, as aforesaid." Issue was taken upon the other pleas.

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At the trial at *Lancaster*, before *Gurney*, B., at the last *Summer Assizes*, the jury found, that the bill was an accommodation bill between the plaintiff and the defendant, and that the indorsement was without consideration; and they found for the plaintiff on the second and third issues, without assessing any damages, and for the defendant on the first and fourth issues.

In the course of last term, *Alexander*, on behalf of the plaintiff, moved for a new trial on the merits, or for judgment for the plaintiff on the first plea, *non obstante veredicto*, on the ground that that plea was bad after verdict. The Court, however, were of opinion that the jury were well warranted in finding that there was no consideration for the bill, and refused to disturb the verdict; but they granted a rule *nisi* for entering judgment for the plaintiff on the first issue *non obstante veredicto*, *Parke*, B., observing, that the defendant might have given the bill as a guarantee, and that, as such pleas were now becoming very general, it was proper that the point should be discussed.

Crompton now shewed cause (a).—The issue raised by this plea was a material issue.

PARKE, B.—The question is, whether the plea is good in form after verdict. Suppose the bill had been indorsed to the plaintiff by way of gift, would the defendant have

(a) *Coram* Lord Abinger, C. B., *Parke*, *Alderson*, and *Gurney*, Barons.

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been liable upon it? If he would have been liable on a mere gift, the plea is not a complete answer. The new rules did not intend such a general plea as this. The instance given by the rules is of a bill given by way of accommodation.

Crompton.—Supposing the bill indorsed by way of gift, if, in point of law, an action could be maintained on such an indorsement, the gift is itself a consideration. Suppose the plea had been, that the defendant had indorsed the bill without any consideration, the plea would be bad by the same rule; the plea negatives the consideration in the terms of the bill. The confusion arises from supposing “consideration” to import the subject-matter, whereas it is more in the nature of an inducement operating on the party’s mind. It would be perfectly correct to say that a man has an inducement for doing a thing; but I submit that we are not bound to prove more than the presumption of law supposes: the presumption of law is, that the consideration is a money consideration; a bill has been held to be evidence of money lent. If that is *prima facie* the consideration, it is sufficient if the plea answers the *prima facie* consideration. In *Holliday v. Atkinson* (a), which was an action on a promissory note, brought by an infant against the executors of the maker, it appeared that the note, which was for 100*l.*, was drawn by the testator in favour of the plaintiff, who was at the time of the age of only nine years. No evidence of consideration was given; and on the trial the Judge directed the jury, that the note being drawn for value received was *prima facie* evidence of some consideration, and that affection for the plaintiff, or gratitude to his father, would be a sufficient consideration; and the jury having found a verdict for the plaintiff, the Court granted a rule for a new trial, upon the ground

(a) 5 Barn. & Cres. 501; 8 D. & R. 163. S. C.

that the Judge's direction, that gratitude to the child's father or affection towards him was a sufficient consideration, was improper. A parol contract is not binding without a consideration; and, therefore, whatever is sufficient in law to constitute a consideration, must be comprehended under the term "consideration" in the plea. But it is objected, that a guarantee being a good consideration, is not embraced by the terms in the plea; it, however, is included, for "having" does not mean corporeally receiving, and therefore the person guaranteeing may be said to "have" a consideration.

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PARKE, B.—The intention of the new rules was to throw the burden of proof on the defendant; and that is plainly shewn by the instance given that the bill was an accommodation bill, the proof of which issue would clearly lie upon the defendant; and therefore there can be no doubt that, properly, the defendant ought to have shewn in his plea the nature of the transaction.

ALDERSON, B.—One of the inconveniences of such a general plea is, that unless the plaintiff denies as generally as the defendant pleads, the issue is thrown upon the plaintiff.

Crompton.—The plea might be bad on special demurrer as being too vague; but supposing the plea to be ambiguously or informally pleaded, it is good after verdict. Where one party in pleading uses an expression (which is ambiguous in itself) in one sense, he cannot afterwards object that it is capable of another meaning; but the ambiguity is cured by verdict. In *Lord Huntingtower v. Gardner* (a), it was held that an ambiguous expression in a declaration is cured by verdict, and must afterwards be taken to have

(a) 1 B. & Cres. 297.

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been used in that sense which would sustain the verdict. So, in *Hobson v. Middleton* (a), it was laid down, that where in pleading an equivocal expression is used, it is generally to be construed most strongly against the party using it; and that if the opposite party pleads over, it is to be construed in that sense which will support the previous pleadings. The objection not being taken till after verdict, it can be looked on only as a misleading or insufficient pleading, within the 32 *Hen.* 8, c. 30. *Weston v. Mason* (b) shews that a verdict will cure an insufficient pleading which would have been clearly bad upon demurrer. The distinction is there taken between a title defectively set forth and a total defect of title. In *Cobb v. Bryan* (c), the defendant avowed for 120*l.* rent in arrear, to which the plaintiff pleaded that the *said* 120*l.* was not due; upon which the defendant joined issue; and at the trial, it appearing that 24*l.* only were due, it was objected that the evidence did not support the issue. A verdict was taken for the defendant for 24*l.*, subject to the opinion of the Court, and it was held that the informality of the issue was cured by the verdict. He also referred to *Bac. Abr. tit. Pleading, M. 2, note*, to the same point. Another question remains: what the Court would direct, supposing the plea is bad? The rule is, to set aside the verdict, and enter a judgment *non obstante veredicto*; but they are clearly not entitled to set aside the verdict, because there has been no miscarriage at the trial; neither is the plaintiff entitled to judgment *non obstante veredicto*, for that is always upon the merits, and never granted but in a very clear case, as appears from 2*nd Saund.* 319, and *note* (c), and *Tidd's Pr.* 922 (9*th ed.*). Where a party, instead of demurring, allows the other party to join issue and go to trial, and get a verdict, it would be a very hard case if the Court could be compelled to give judgment for that party, pro-

(a) 6 B. & Cres. 295. (b) 3 Burr. 1728. (c) 3 Bos. & Pull. 348.

bably against the merits of the case. If the plaintiff is entitled to ask for any thing, it is for a repleader. The distinction between a repleader and a *venire facias de novo* is stated in *Stephen on Pleading* (a), from which it appears that a repleader is properly grantable where either party has, from a misapprehension of the law, or oversight, passed over without demurrer a statement on the other side, insufficient and immaterial in law, and an issue in fact has been joined on such immaterial statement, which issue is plainly immaterial, though the parties have made it the point in controversy between them; in such case the Court, not knowing for whom to give judgment, will order the parties to plead *de novo*, for the purpose of obtaining a better issue. *Kemps v. Hall* (b), and many other authorities, are cited. A *venire facias de novo* is, it is said, to be awarded, when, by reason of some irregularity or defect in the proceedings on the first *venire*, the proper effect of that writ has been frustrated; and that where the unsuccessful party objects to the verdict in respect of some irregularity or error in the practical course of proceeding, rather than on the merits, the form of the application is a motion for a *venire de novo*, and not for a new trial. On the merits there was a strong case for the defendant; but here there were no damages found for the plaintiff, and therefore the only thing that can be done is, to order a *venire de novo*, to try the issue over again. That appears from *Clements v. Lewis* (c); there, in an action for libel, the jury having found for the defendant on six out of eight pleas comprehended in the last of two issues, and for the plaintiff on the residue of those pleas and on the first issue, without assessing damages, and the plaintiff having, pursuant to the decision of the Court of *King's Bench*, entered up, as to the pleas found for the defendant, judgment *non obstante veredicto*, with an award of a writ of inquiry, and final

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(a) 2nd ed. 130, 131.

(b) Hobart, 113.

(c) 3 Brod. & B. 297.

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judgment for the damages found by the inquisition, &c., a Court of error reversed the judgment of the Court of *King's Bench* as to the award of the writ of inquiry and the final judgment thereon—remitted the record to the Court of *King's Bench*, and directed that Court to award a *venire de novo* to try the first issue and the last, as far as related to the pleas on which the finding was for the plaintiff; holding that the verdict for the plaintiff on the first issue and on the last (as far as regarded the pleas on which the finding was for the plaintiff) was void, because no damages had been assessed. The defendant has a right to have the damages assessed by the same jury who tried the issue, and even a release of the damages would be of no avail (a).

PARKE, B.—The defendant ought properly to have pleaded in the first instance that 50*l.* had been paid by the acceptor, and issue thereon, and 50*l.* by the defendant, and issue thereon; but this defect is cured by verdict.

Alexander and Cowling, in support of the rule.—The question is, whether the plea is good, and whether it affords any answer to the action. The rule is, that every plea must be taken most strongly against the party pleading it; the words “value” or “consideration” can only be taken in the popular meaning of those words, and, unless the later cases are to be considered as having established a different rule, it may be contended that a want of consideration is never a defence to an action on a negotiable instrument (b). *Pillans v. Van Mierop* (c), *Tate v. Hibbert* (d), *Seton v. Seton* (e), *Lefevre v. Lloyd* (f), *Price v. Ed-*

(a) Com. Dig. tit. Pleading, E.
 1, 3, 8.

(b) 2 Bl. Com. 245.

(c) 3 Burr. 1663, 1670.

(d) 2 Ves. jun. 111.

(e) 2 Bro. C. C. 610.

(f) 5 Taunt. 749.

monds (a), *Perfect v. Musgrave* (b). Since *Holliday v. Atkinson* (c), it may be difficult to contend, that in an action against the acceptor of a bill, a want of consideration does not afford a defence; but an indorser is in a different position; if the acceptance be on a good consideration, he has necessarily a sufficient consideration for his indorsement, *viz.* his remedy over. A want of consideration, therefore, is a defective defence; he should either have added that it was indorsed for the accommodation of the plaintiff, or that the acceptance was without consideration. A bill of exchange is compared to money by *Parke, J.*, in *Stephens v. Wilkinson* (d). Now, assuming the acceptance to have been for value, if the defendant had paid the plaintiff the amount of the bill, he could not recover it back on the insolvency of the acceptor; and, therefore, according to that reasoning, there is no sufficient want of consideration. In *Sowerby v. Butcher* (e), Mr. Baron *Bayley*, in giving judgment, says:—"The debt of a third person is a good and valid consideration, for which a party may bind himself by a bill, and the consideration need not of necessity be such as would enable the plaintiffs to sue on a special contract. If there is a detriment to the plaintiffs, and they have a right to insist upon a bill from any person, that is enough; and it is not sufficient for the defendant to shew that there was not such a consideration as would support an action, independently of the bill." And in *Clarke v. Marsden* (f), it was held, that it was not of itself a defence to an action by the indorser of a bill of exchange, to plead that it was accepted for the accommodation of the drawer, without consideration, and was indorsed over after it became due.

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PARKE, B.—In that case, the Court might have thought

(a) 10 B. & C. 578.

(b) 6 Price, 111.

(c) 5 Barn. & Cres. 501.

(d) 2 B. & Ado. 326.

(e) 2 C. & M. 372.

(f) 1 Taunt. 224.

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that an agreement not to negotiate the bill would have made a difference. There was a similar case in this Court last term, where the parties had leave to amend (a).

Alexander and Cowling.—At all events the words “had and received” vitiate the plea. Taking them most strongly against the party pleading them, they must be understood to mean some tangible consideration.

LORD ABINGER, C. B.—That argument would exclude all consideration of advantage without any thing of value being received by the defendant.

PARKE, B.—If the plaintiff had forbore to sue for a time, would not that have been a consideration had by the defendant?

Alexander and Cowling.—In the case of a guarantie, or the like, there is a consideration for the promises both of the guarantee and the guaranteed; but the latter only can be said to have “had or received” the consideration, and to be the debtor. A forbearance to sue the defendant would have been a consideration “had or received” by him; but a forbearance to sue another at the request of the defendant would not, and would therefore be excluded by the plea. No consideration need be received by the defendant; all that is requisite is, that a consideration should move from the plaintiff, and at the request of the defendant. All precedents, as far as they can be found, have no such words as consideration “had or received”—*e. g.* those in the replications in *Hedges v. Sandon* (b), *Smith v. Dovers* (c). There is, therefore, rather a defective title or defence, than one defectively set forth; and

(a) See *Stein v. Yglesias*, ante, 252.

(b) 2 T. R. 439.

(c) 2 Dougl. 428.

therefore it is not cured by verdict. The case is the same as if no evidence of consideration had been offered by the plaintiff, and is therefore as if the objection were taken on general demurrer to the plea. If, then, the defect be not cured by verdict, the plaintiff is entitled to judgment *non obstante veredicto*. *Goodburne v. Bowman* (a) has laid down as a general rule, that, since the statute of *Anne*, which enabled a defendant to plead several matters, if some of those pleas be bad after verdict, the plaintiff shall have the benefit of the verdict he has obtained against the defendant on the other pleas, unless good reason to the contrary be shewn. The language of the Court in *Clement v. Lewis* (b) as to the *venire* is ambiguous; but as they gave judgment for the plaintiff, the *venire* could have been only to assess damages, and not to retry the issues. But, in addition, that case is founded on *Cheyney's case* (c), which goes on the sole reason that an attaint would have lain against the jury for not finding damages, and that where such is the case, the defect cannot be supplied by a writ of inquiry; but since, and probably in consequence of *Clement v. Lewis*, the 6th Geo. 4, c. 50, s. 60 has abolished the writ of attaint, and all its consequences; otherwise the abolition would have been a nullity in practice, and therefore it has enabled the Court to award a writ of inquiry to assess the damages of the plaintiff on the pleas of payment. The Court will look to the whole of the record, and upon that it will appear that the first plea is no answer to the action, and the plaintiff is therefore entitled to judgment.

Cur. adv. vult.

Lord ABINGER, C. B., on the last day of term, delivered the judgment of the Court. After stating the pleadings,

(a) 9 Bing. 532, 667.

B. 297; 3 B. & Ald. 702.

(b) 7 Moore, 200; 3 Brod. &

(c) 5 Co. 464.

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his Lordship proceeded thus:—We are disposed to think the plea clearly bad on special demurrer. The object of the new rules was, to give notice by the pleadings what was the real consideration for the bill, as that it was an accommodation bill, or that it was given for a gambling debt, or any of the various other defences which may be set up to an action on a bill of exchange: which object would be entirely frustrated if a plea of this sort could stand; and therefore the plea ought to have shewn what the nature of the transaction was. But the question here is, whether, after verdict, this plea can be sustained, both parties having gone to issue upon the plea in the general terms in which it was pleaded, and both parties being at liberty to go into the question of consideration. That question turns upon the particular form of the issue, the words of which are “without having or receiving any consideration,” and whether these words exclude certain considerations, such as forbearance or giving credit, which could not be properly said to have been had or received. As far as regards those considerations, I think a party may fairly be said to have them. It was objected, however, that a bill might be indorsed as a gift, and, if so, it would in one sense be without consideration; but such a gift must have been made upon some ground, as of relationship or affection. Family affection might, I think, be such a consideration as would sustain the plea. If a man give money as a gift, he cannot recover it back; but a promise merely to give money would not be binding, and therefore I do not see myself how such a case can raise a cause of action. Where a negotiable instrument is given to a party, who discounts it and receives the money, as the donor could not recover it back, the gift would be a good consideration. But the question is different, whether he thereby binds himself to pay the bill. No case has been cited. A parol promise, or one not under seal, does not bind without a consideration; a gift is not such a consideration as would

maintain an action; and therefore we think the plea means no *such* consideration as would maintain an action, and, therefore, that after verdict the plea is good.

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♦
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Rule discharged.

ATKINSON v. WARNE.

TRESPASS. - The declaration, which contained one count only, charged that the defendant on &c., with force and arms, made an assault upon and beat the plaintiff, and caused him to be apprehended on a false and malicious charge of felony, and forced him to go from a certain dwelling-house situate &c. into a public street and in and along divers public streets to a certain station-house, and there imprisoned the plaintiff upon the said charge for the space of three days then next following, and afterwards then compelled him to go into a public street and in and along divers public streets to a public office situate &c., and then and there imprisoned the plaintiff upon the said charge, without any reasonable or probable cause, for a long time, (to wit) forty-eight hours then and next following, and against the will of the plaintiff, by means whereof &c.

Where a plea justified two assaults (the declaration only charging one) and no evidence was given of the second assault mentioned in the plea, and the jury found a verdict for the defendant:—
Held, that as it was unnecessary to have justified a second assault in the plea, it was unnecessary to prove it.

Plea.—The defendant in his own person says, that before the commission of the said supposed trespasses in the said declaration mentioned, to wit, on &c. the said plaintiff did then feloniously take, steal, and carry away divers, (to wit) twenty pounds of feathers, part of a certain bed let to be used by him in and with divers rooms and premises, part of the dwelling-house in the said declaration mentioned, under a certain contract entered into by him; whereby the said plaintiff was guilty of felony, contrary to the form of the statute in such case made and provided, and against

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the peace of our lord the King: wherefore the defendant did at the time when &c. in the said declaration mentioned, assault and beat the said plaintiff and gave the said plaintiff in charge to one *T. B.* then being one of the metropolitan peace officers according to the statute, and a peace officer of our said lord the King duly authorized in that behalf, and then and there requested the said *T. B.*, so being such peace officer as aforesaid, to take the said plaintiff into his custody, and safely keep him, and carry and convey him the said plaintiff into the said street, and in and along the said public streets, to a certain station-house, as in the said declaration mentioned, and to imprison the said plaintiff upon the said charge, and to carry and convey him afterwards before some one of the justices assigned to keep the peace of our said lord the King within the said county, to hear and determine divers felonies and misdemeanours committed within the said county, to be examined by and before such justice touching and concerning the premises, and to be further dealt with according to law. And on that occasion the said *T. B.*, so being such peace officer as aforesaid, at the request of the said defendant, did assault the said plaintiff, and did take the said plaintiff into his custody; and because the said plaintiff did resist and beat the said *T. B.*, and would not, being then and there requested, peaceably and quietly proceed with the said *T. B.* to the said station-house, he the said *T. B.* did then and there necessarily a little strike and beat the said plaintiff, and did oblige the said plaintiff to go, and did carry and convey the said plaintiff from the said dwelling-house into the said publicstreet, and in and along divers other public streets to the said station-house in the said declaration mentioned, and did then and there imprison the said plaintiff upon the said charge for the said space of time in the said declaration mentioned, being then and there a reasonable time in that behalf; and as soon as conveniently could be compelled the said plaintiff to go into a street and in

and along divers public streets to a public office situate &c., and then and there imprisoned the said plaintiff; and the said plaintiff was accordingly carried and conveyed in custody to the said public office before *J. R.*, Esq. one of the justices assigned to keep the peace of our said lord the King, within and for the county aforesaid, and also to hear and to determine divers felonies, trespasses, and other misdemeanours in the said county, to be examined by and before the said *J. R.*, Esq., so being such justice as aforesaid, touching and concerning the premises, and to be further dealt with according to law. And so by means of the premises the said defendant made an assault upon and beat the said plaintiff, and caused him to be apprehended on the said charge of felony, and forced him to go from the said dwelling-house into a public street, and in and along divers public streets to the said station-house, and imprisoned the said plaintiff upon the said charge, and compelled him to go into the said public street in that behalf mentioned, and in and along divers public streets to the said public office, and imprisoned the said plaintiff upon the said charge for the said space of time in the said declaration mentioned, the same being a reasonable time for that purpose; and which are the said supposed trespasses in the said declaration mentioned; and whereof the said plaintiff hath above complained against the said defendant; and this the said defendant is ready to verify, &c.

Replication, *de injuriâ*.

The jury having found a verdict for the defendant—

F. V. Lee now moved to set aside the verdict, and enter a verdict for the plaintiff, on two grounds:—*First*, that the defendant had not proved the whole of his special plea, no evidence being given of the fact there stated that the plaintiff resisted the officers, and that, therefore, they used violence to him; and *secondly*, that the verdict was against evidence.

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LORD ABINGER, C. B.—The defendant has justified one assault, and only one assault was proved. The defendant has gone further in his plea than was necessary (in justifying a second assault), and I think it was unnecessary for him to prove that part of the plea. There was but one count for one assault, and therefore there could have been no new assignment of another assault unless the plaintiff admitted the justification as to the assault which the plea applied to. As to the verdict being against evidence, it certainly was not conclusive, but there was some evidence. The rule must be refused.

BOLLAND and GURNEY, Barons, concurred.

Rule refused.

MOODY v. ASLATT.

The Court refused to allow the christian name of a plaintiff to be amended after issue joined.

HUMFREY moved for a rule calling on the defendant to shew cause why the declaration and issue should not be amended on payment of costs, by altering the christian name of the plaintiff from *William* to *John*. The action was brought to recover damages sustained by the plaintiff in consequence of the upsetting of a coach, occasioned by the negligence of the defendant. The writ and proceedings throughout stated the plaintiff's name as *William Moody*, his real name being *John Moody*. It appeared that there were two *Moody*s, father and son; the father, whose name was *John*, was proprietor of the coach, and the son, whose name was *William*, was the coachman. It was apprehended that the mistake might occasion some difficulty at the trial.

PARKE, B.—It is only a misnomer, and cannot now be

taken advantage of by the defendant. The accident happened to *John*; and if he is the real party suing, the defendant, before the statute (a), could only have pleaded in abatement, and therefore no difficulty can arise. You may go on with your action.

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ALDERSON and GURNEY, Barons, concurred.

Rule refused.

(a) 3 & 4 Will. 4, c. 42, s. 11. This section takes away pleas in abatement, and in lieu thereof enables the defendant to cause the declaration to be amended at the plaintiff's expense. *Misnomer of the plaintiff* (even in the name of a corporation) must formerly have been pleaded in abatement. *Clerk of Trustees of Taunton Market v. Kimberley*, 2 Bls. 1120.

SHORT v. CAMPBELL.

PRICE moved to discharge a defendant out of custody on account of the insufficiency of the affidavit to hold to bail. The affidavit was made by a person who described himself as agent and collector to the plaintiff an hotel-keeper in the *Strand*. It was urged that it did not appear what means the deponent had of knowing that the defendant was indebted to the plaintiff in the sum sworn to.

An affidavit of debt made by a person who described himself as agent and collector to the plaintiff an hotel-keeper—*Held* sufficient.

Per Curiam.—The affidavit is sufficient.

Rule refused.

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JONES v. BRAMWELL.

Where the plaintiff is suing as a trustee, and there are circumstances of suspicion in the case, the Court will stay proceedings on payment of the debt into Court, and on payment of costs; leaving the plaintiff to apply to the Court to have his extra costs out of the fund in Court.

HUMFREY shewed cause against a rule which had been obtained by *W. H. Watson* for staying the proceedings in this action on payment of costs. From the affidavits it appeared that the action was brought by the plaintiff on an apprentice deed against the defendant, who had covenanted with the plaintiff as trustee for the apprentice, who was his nephew, to teach him the business of a surgeon and apothecary; and when the time was nearly expired, it turned out, that in consequence of the defendant not having been duly licensed, the apprentice's time of service was wholly lost. The father was insane, and the plaintiff's name was, according to his affidavit, inserted in the deed with the knowledge and approbation of the mother. The action was brought to recover back the premium of 100*l.* paid with the apprentice. The mother swore that the action was brought without her knowledge or approbation, and that the plaintiff had no right to interfere. It was now contended that as it was the duty of the trustee to bring the action, the Court would not stay the proceedings except on the terms of paying the 100*l.* and all costs to the plaintiff. On the other hand, it was alleged that the plaintiff was not a responsible person; and that, under the circumstances, if he was indemnified against the costs, it would be sufficient.

Lord ABINGER, C. B.—We think the rule should be absolute on bringing the 100*l.*; into Court and on payment of costs. The action appears to be brought suspiciously, and the plaintiff will have an opportunity of moving to have his extra costs out of the 100*l.*; and the Court will then judge whether it will be proper or not to make the order.

Rule absolute.

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SUTTON v. BURGESS.

ARCHBOLD shewed cause against a rule which had been obtained by *Mansel*, calling upon the plaintiff to shew cause why the bail-bond given by the defendant should not be cancelled, and the defendant discharged out of custody. The rule was moved for on two grounds—*first*, that the copy of the *capias* served on the defendant was an incorrect one; the copy of the writ was thus: “if *se* shall be found in your bailiwick,” instead of “if *she* shall be found in your bailiwick,” as it was in the writ. He contended that the mistake was immaterial, and relied upon *Forbes v. Mason* (a), where the Court of *Common Pleas* refused to discharge a defendant, because in the copy of the *capias* the particles “the” and “by” were omitted, the Court considering that the meaning of the writ was not altered by the omissions. The *second* objection was, that the indorsement was wrong. After stating the debt, it proceeded thus: “and if the amount thereof be not paid within four days from the *arrest or service* hereof,” &c. The form given by the act has the word “service.” In all the cases which have occurred on the form of this indorsement the word “service” was omitted altogether. The act requires the party arrested to be served with a copy; but the copy is served upon the defendant after the arrest, and therefore “arrest” and “service” are equivalent, and the defendant could not be misled.

A *capias*, which was in this form, “if *se* shall be found in your bailiwick,” instead of “if *she* shall,” &c., was held not to be so defective as to warrant the Court in discharging the defendant from custody.

An indorsement on the copy of a *capias* served on a defendant at the time of the arrest, which required the defendant to pay the debt within four days from the arrest or service thereof:—*Held*, sufficient.

Mansel, in support of the rule, cited the words of the act (b), which requires a copy to be given to the sheriff's officer, who is to deliver it to the defendant. The copy ought to be correct. In *Forbes v. Mason* the sense was not altered. In *Smith v. Cromp* (c), the Court said they

(a) *Ante*, Vol. 3, p. 104; 1 Bing. N. S. (b) 2 W. 4, c. 39, s. 4.

(c) *Ante*, Vol. 1, p. 519.

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would not enter into the question whether the variance was material or not. In *Smith v. Pennell* (a), the Court said the copy must be an exact copy; there the writ was indorsed "*Old Jewry, London*," and in the copy "*London*" was omitted. Here if the word "she" is taken away altogether, there would be a material omission. The second objection is also material, because the form given by the act has not been followed. In *Cooper v. Waller* (b), the Court drew a distinction between a noncompliance with the act of Parliament and a rule of Court, and held that the former was a positive informality, and that the latter was an irregularity merely, though they thought it right to give the plaintiff an opportunity to amend.

LORD ABINGER, C. B.—Upon the first point, the case in the *Common Pleas* of *Forbes v. Mason* is exactly in point. Here there is no different word introduced, nor is the sense altered.

BOLLAND, B.—The writ afterwards explains what is meant by the following words, "and her safely keep."

PARKE, B.—As to the indorsement—as the copy was not served till after the arrest, the word "arrest" may be rejected as surplusage. The defendant could not have been misled.

Rule discharged with costs.

(a) Ante, Vol. 2, p. 654.

(b) Ante, p. 167.

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HUNTER v. HORNBLLOWER.

BLACKBURNE had obtained a rule *nisi* for a new trial in this action, on the ground that the cause had been tried at the last *Yorkshire* Assizes, and taken as an undefended cause, in the absence of the defendant and his attorney, without the cause being set down in the paper or in the marshal's book.

Alexander shewed cause, upon an affidavit that notice of trial had been regularly given, that the cause was entered in the marshal's book in the regular way, and was numbered 47.

ALDERSON, B.—The causes are entered in two lists for the East and West Riding; it does not appear in which list it was entered.

Alexander.—Was it not the duty of the defendant's attorney to search both lists?

ALDERSON, B.—I think not.

PARKE, B.—It will depend upon the fact whether a mistake was made in entering the cause in the wrong book.

On a subsequent day his Lordship said, that the marshal's book had been examined, and the cause was found to have been entered in the wrong book, and that therefore there should be a new trial.

Rule absolute.

At the assizes in *Yorkshire*, the causes are entered by the marshal in two lists, one for the East Riding and the other for the West Riding. A cause having, by mistake, been entered by the marshal in the wrong list, was tried as an undefended cause, the defendant's attorney having searched only one list, without finding it. The Court granted a new trial, and held that the attorney was not bound to search both lists.

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VICKERS v. COCK.

Upon trials before the sheriff, neither party is entitled to the sheriff's notes for the purpose of making a motion for a new trial.

In *assumpsit* for refusing to allow the plaintiff to proceed with certain work according to agreement, the defendant pleaded that the work was to be done to the satisfaction of *A. B.*, and that part of the work which was done was not done to his satisfaction, and that therefore he discharged the plaintiff:—*Held*, that upon this issue it was not necessary for the defendant to call *A. B.*

ASSUMPSIT on a special agreement, whereby the plaintiff agreed with the defendant to paint a ship, &c. in a workmanlike manner, for 12*l.*, to the satisfaction of Captain *Brown*; breach, that, after part of the work was done, the defendant refused to allow the plaintiff to finish the work. The defendant pleaded that the part that was done was not done in a workmanlike manner to the satisfaction of Captain *B.*, and that he therefore discharged the plaintiff; upon which the plaintiff took issue. The cause was tried before the sheriff, and the defendant began, and obtained a verdict. It had been objected at the trial, on the part of the plaintiff, that the captain's dissatisfaction with the work done ought to have been proved by himself; he was proved to be alive. The objection was overruled.

Mansel now moved for a new trial; and as the sheriff's notes had been delivered to one of the Judges, *Mansel* applied for them for the purpose of making the motion; but the Court were of opinion that he was not entitled to the notes for that purpose. *Mansel* then renewed the objection that the plea was not proved, and contended that nothing but the evidence of Captain *B.* was sufficient for that purpose; and also that Captain *B.* had no power to discharge the plaintiff in the course of the work, unless it was proved that the work was not done to the satisfaction of Captain *B.*

PARKE, B.—Your motion is rather for judgment *non obstante veredicto*, or in arrest of judgment. The plaintiff could not have recovered for his work without proving that it was done to the satisfaction of Captain *Brown*. The breach in the declaration was for discharging the plaintiff from doing the remainder of the work; to prove

that, the defendant was certainly not bound to call Captain *Brown*: but the fact might be proved in any other way.

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LORD ABINGER, C. B., BOLLAND, and GURNEY, Barons, concurred.

Rule refused.

NEAL v. HOLDEN.

JOHN JERVIS had obtained a rule *nisi* calling on *Tabram*, the plaintiff's attorney, to shew cause why an attachment should not issue against him for giving a false address of the plaintiff; and why, in default of his giving the true address within a certain time, he should not pay all the costs incurred by the defendant; and why all proceedings should not be stayed.

An attorney who gives a false residence of his client, without using proper means to ascertain whether it is correct or not, subjects himself to the costs which may be occasioned by moving for an attachment against him; but he is not liable to pay the costs of the action, if he is *bond fide* unable, after proper inquiry, to give his client's residence.

Kelly shewed cause upon an affidavit of the attorney, from which it appeared, that in *November*, 1832, he applied on behalf of the plaintiff to the defendant, for a debt of 3*l.* for some flour supplied by the plaintiff, for which the defendant had become responsible; that the defendant then called on him, and admitted that he had become responsible, but supposed it had been paid for. In *October*, 1833, the attorney received a letter from the plaintiff, dated "*Bridport*," directing him to take legal proceedings against the defendant, and he afterwards received another letter from the plaintiff dated *Lynn*; that, on a summons having been taken out by the defendant requiring the plaintiff's attorney to give the residence of the plaintiff, he had consented to it, and given "*Bridport*," the date of the letter; but the plaintiff not being found there, the attorney, on another summons being taken out, gave "*Lynn*," the date of the second letter. That in *Hilary*

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Term, 1834, the defendant, in consequence of both addresses turning out to be false, applied to this Court for an attachment against the attorney for giving such false addresses. The Court, on that occasion, considering the attorney to have been guilty of negligence in giving those addresses without making proper inquiries, ordered him to pay the costs occasioned thereby, and also the costs of the motion, and that proceedings should be stayed until a true address was given. It was now contended, that, as there had been no new default on the part of the attorney since *Hilary* Term, 1834, this motion was unnecessary and unwarranted. The affidavit further stated, that numerous inquiries had been made, and every endeavour used to find the residence of the plaintiff, but without success, though it was believed he had gone to *Van Dieman's Land*; and that it had been ascertained that the plaintiff had once lived at *Bridport*, and was a miller there, but had left at *Michaelmas*, 1832. Though the attorney had acted incautiously in giving the residences he had given, without making proper inquiries, he had, it was said, been sufficiently punished by the payment of heavy costs; but, as attorney, he was not liable for the costs of the action, and could not prevent his client's going away.

Jervis, in support of the rule, relied on the affidavit of the defendant, that he knew nothing of the plaintiff, and never had any transaction with any person of that name; and contended, that the attorney was bound to give the true address of his client or pay the costs of the action. He relied on the words of the 17th section of the 2 *Will.* 4, c. 39, which directs, that the attorney, on being required so to do, shall declare in writing the profession, occupation, or quality, and place of abode of the plaintiff, on pain of being guilty of a contempt of Court. If the writ was issued without sufficient authority, the attorney is in

contempt, and is liable either to an attachment, or to pay the costs of the action.

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Lord ABINGER, C. B.—The application for an attachment is too late; and we think this application might have been spared, and that the rule should be discharged without costs, and proceedings stayed for ever.

Rule discharged.

UNDERHILL v. HURNEY.

CROMPTON obtained a rule *nisi* for setting aside a demurrer to the second count of the declaration, on the ground that it was frivolous, and pleaded for delay. The *first* count was on a promise to the plaintiff, as surviving partner of *John Roberts* deceased. The *second* count commenced thus: "and whereas in the lifetime of the said *John Roberts*," &c.; without averring that he was dead. The rule was drawn up on reading the declaration and the demurrer and marginal note.

Where a defendant pleaded a frivolous demurrer so late in the term that there was not sufficient time to set it down for argument, and a motion was made to set it aside, the Court would only let the defendant in to plead on an affidavit of merits, pleading *instantly*, and paying the costs of the demurrer and the application.

Chandless shewed cause, and objected that the matter had already been before Mr. Baron *Alderson*, at chambers, who had refused to interfere, and that therefore the case ought to have been set down for argument in the regular way. It appeared, however, that then there was not sufficient time to have had it argued in the term, and

The Court were about to make the rule absolute; but, upon an affidavit of merits, granted leave to withdraw the demurrer, pleading *instantly*, and paying the costs of the application and the demurrer.

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DOE *d.* BAKER *v.* ROE.

The Court will stay proceedings in an action if it appears to be doubtful whether the action is brought with the knowledge and consent of the plaintiff.

E. V. WILLIAMS had obtained a rule *nisi* for staying the proceedings in this action on payment of costs, on the ground that the action was proceeded with without the authority or knowledge of the lessor of the plaintiff.

The *Solicitor-General* and *Wightman* shewed cause.— In the affidavits in support of the motion, it was alleged that the lessor of the plaintiff had been out of her mind for a twelvemonth. The tenant was the son-in-law of the lessor of the plaintiff, and swore that he believed that she did not intend to turn him out of the farm. Her son and her regular medical attendant joined in the affidavits in support of the motion. On the other side were the affidavits of the attorney and another son, and also of a medical man who had seen her once some time before, who swore that she was not out of her mind, and had authorized the action, and knew that it was going on. There was, however, no affidavit on either side by the mother herself.

PARKE, B.—I think we ought to be satisfied that the mother is cognizant of the proceedings which are going on in her name, and at present that does not sufficiently appear. The rule must therefore be absolute for staying the proceedings till the further order of the Court, and until the Court is satisfied that the action is proceeding with her knowledge and authority.

Rule absolute accordingly.

1835.

BIGGS v. MAXWELL.

MANSEL obtained a rule *nisi* to set aside an order of Mr. Baron *Bolland*, confining the defendant to the plea of the general issue. It was an action on an attorney's bill, and judgment had been signed for want of a plea; but on an affidavit of the defendant that she had supplied her attorney with money to put in a plea, but that he had run away, a Judge at chambers gave her leave to plead on an affidavit of merits and payment of costs. She accordingly pleaded, that no signed bill had been delivered by the plaintiff according to the statute. A Judge's order was afterwards obtained for leave to add two pleas—*non assumpsit*, and that the plaintiff had not taken out his certificate—which pleas were pleaded. Some weeks afterwards, upon application to Mr. Baron *Bolland*, that learned Judge made the order (which was now sought to be set aside), that the defendant should be confined to the plea of the general issue. It was sworn that the three pleas were necessary for the defendant's defence.

In an action on an attorney's bill, the defendant's attorney suffered judgment to go by default, which was set aside on an affidavit of merits and payment of costs, and the defendant was let in to plead. She pleaded that no signed bill had been delivered, and afterwards added two pleas of *non-assumpsit*, and that the plaintiff had not taken out his certificate. The plaintiff, on application to a Judge at chambers, obtained an order, confining the defendant to the plea of the general issue. The Court held that this order was proper, it appearing that the defendant had had the bill taxed.

Archbold shewed cause.—The defendant has had the bill taxed, but the order for taxation was not drawn up on the usual terms of paying what should be found due. The plaintiff was therefore compelled to resort to an action, and ought not to be met by a plea that the bill was not signed.

Mansel, in support of the rule.—The defendant was entitled to retain her first plea. It ought to have been objected to in the first instance; and the learned Judge had no power to rescind the first order for pleading that plea. There is an affidavit that no signed bill has been delivered.

PARKE, B.—The defendant has had all the benefit of

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the statute, and ought to have paid the money. After a regular judgment by default, the defendant ought not to be let in to plead that plea.

Rule discharged.

ALEMORE v. ADEANE.

HOPE v. Same.

Where the sheriff applied for relief under the Interpleader Act, but it appeared that an attachment had been already obtained against him for not returning the writ, the Court would only make the rule absolute on the terms of his paying for moving for the attachment.

CHILTON shewed cause against a rule obtained on behalf of the sheriff under the Interpleader Act. The claimant did not appear. The defendant's effects were assigned under the Insolvent Act on the same day that the sheriff had taken the goods in execution at the suit of the plaintiff. That was on the 11th of *December*. Notice of the assignment was given on the next day. Before the present rule was moved, an attachment had been obtained against the sheriff for not returning the writ. He contended that the plaintiff had been brought unnecessarily before the Court.

LORD ABINGER, C. B.—The attachment was regular, and the rule can only be absolute on payment by the sheriff of the costs of the attachment.

Rule absolute accordingly.

Platt appeared for the sheriff.

1835.

WHITE v. BRAZIER.

R. ALEXANDER moved for a rule to review the Master's taxation (in taxing the defendant's costs of the day), as far as regarded the allowance made for two witnesses. The affidavit of one of the witnesses stated that he was master of a vessel, and that he came to *England* from *America*; and that he should have returned on a voyage there, but had been detained in this country as a witness from *August* to *November*; that, as master of the vessel he was entitled to receive 7*l.* per month wages, but had only been allowed by the Master his expenses of living here and his travelling expenses. It was objected before the Master that these witnesses ought to have been examined on interrogatories, and that keeping them here was an unnecessary expense; and an affidavit of the attorney stated that the Master had disallowed the principal portion of the expenses of these witnesses on that ground. It was contended, on the authority of *Macalpine v. Poles* (a), that the Master ought to have inquired into the circumstances and exercised his discretion. It was also contended that the witnesses ought to have been allowed wages for the time they were necessarily detained here.

A master of a vessel detained here as a necessary witness, was allowed in the taxation of costs the expenses of his living here, and his travelling expenses, and disallowed a claim of 7*l.* per month for wages, which, if he had sailed, he would have been entitled to:—*Held*, that the allowance was proper.

Lord ABINGER (having inquired of the Master) said, that a discretion had been exercised in the disallowance of certain portions of the sums charged for the witnesses, and that the Master was right in not allowing the claim for wages.

The rest of the Court concurred.

Rule refused.

(a) 3 Tyrwhitt, 871; and ante, Vol. 2, p. 299, S. C.

1835.

BENWELL and Another *v.* HINXMAN and Another.

Where the time for making an award is enlarged by the arbitrator, without strictly complying with the directions of the order of reference, but the time is subsequently again regularly enlarged, with the consent of the parties, no objection can be made to the award on account of the first irregular enlargement of the time.

ALL the matters in question in this cause between the parties were, by an order of *Gurney, B.*, dated 29th *May*, 1834, referred to an arbitrator; and, by the terms of the reference, he was to make and publish his award in writing on or before the 28th of *June* next ensuing, or such further or ulterior day, not exceeding the 28th *July* next, as he should appoint and signify in writing under his hand to be indorsed on that order, and as the Court of *Exchequer*, or a Baron thereof, might order. The award was dated the 10th *December*, 1834, and it was recited in the award, that, on the 30th *May*, 1834, the arbitrator did duly enlarge the time for making his award until the 28th *July* then next; but it did not appear that that enlargement was confirmed by any rule of the Court of *Exchequer*, or any order of a Baron thereof. The time was enlarged two several times by Barons' orders; the first on the 27th *July*, 1834, till the 30th *October* then next, and the second on the 24th *October*, 1834, until the 31st *December* then next ensuing. The award was made and published in writing on the 10th *December*, 1834. The two last-mentioned orders were made by consent, but it did not appear that the arbitrator concurred in them or either of them.

White moved to set aside the award on the ground that it was made after the authority of the arbitrator had ceased, and that the first enlargement of time not having been properly made, that is to say, having been made by the arbitrator only, but not confirmed by rule of the Court of *Exchequer*, or order of a Baron thereof, invalidated the award. He relied upon *Mason v. Wallis* (a). There, by

(a) 10 B. & C. 107.

a Judge's order, a cause was referred to an arbitrator, so as he should make his award in writing on or before the 1st day of *July* then next, or on or before such further or ulterior day as he should appoint in writing under his hand, to be indorsed on that order, and the Court of *King's Bench*, or a Judge thereof, should order. The arbitrator, by indorsement on the order, enlarged the time; but at the time when he made his award, no Judge's order had been obtained ratifying that enlargement; and it was held that the arbitrator had no authority, and that the award was bad. The question of consent there does not appear to have been raised.

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PARKE, B.—I am of opinion that, if the latter orders were made by consent, you are concluded by them. The award of an arbitrator would be good without any order of reference; and, therefore, when the time allowed by the order of reference had expired, there was nothing to prevent both parties from agreeing to allow the arbitrator to continue to act until the award was made.

White.—There are also two objections on the face of the award—*first*, the award is not final; the arbitrator awards, orders, adjudges, and determines that there is due and owing from the defendants to the plaintiffs the sum of 27*l.* 4*s.* 9*d.*, and awards, orders, and adjudges, that payment thereof shall be made to the said plaintiffs or their attorney, and on their behalf, by or on behalf of the said defendants, on or before the 20th *January* next ensuing, at the office of the said attorney of the said plaintiffs, in full of all demands; and that upon payment of the said sum, together with all costs and expenses, pursuant to the said order of reference, all further proceedings in the said cause shall cease and be no further prosecuted. The award, therefore, is not final, inasmuch as, if the money should not be paid by the defendants on the day appoint-

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ed, the plaintiffs may proceed in the cause; one main object of the defendants in consenting to the reference having been to prevent their doing so. The arbitrator also exceeded his authority by giving a day of payment to the 20th *January*, when he had not authority to do so.

PARKE, B.—The arbitrator finds a certain sum to be due from the defendant. If the award had stopped there, no objection could possibly be made to it, and the only question is, whether the latter clause was intended to add any qualification. I am of opinion that the latter clause does not qualify the former part. If the arbitrator has exceeded his authority by ordering money to be paid at a future day, when he had no power to do so, the only consequence will be that that part of the award being void, the money was payable by the defendant immediately. Nothing, therefore, will be taken by the motion.

BOLLAND and GURNEY, Barons, concurred.

De Arbitration v. Savier, 9 M. & W. 48.

BEGBIE v. GRENVILLE.

Upon an issue of *nul tiel* record, the plaintiff gave notice to the defendant to produce the record; and, upon his neglect to do so, moved for judgment. The Court held the notice to be irregular, and refused the rule.

THIS was an action of trespass for false imprisonment. The defendant by plea justified under a judgment, upon which an issue of *nul tiel record* was taken by the plaintiff. The roll was in Court at the instance of the plaintiff, upon a notice given by him to the defendant to produce it.

Mansel moved for judgment for the plaintiff, for non-production of the record by the defendant.

Platt, for the defendant, objected that the plaintiff's proceedings were irregular.

PARKE, B.—The plaintiff ought to have given a four day rule to produce.

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Mansel.—The rule of *Hilary* Term, 4 *Will.* 4, s. 6, expresses that no motion or rule for a *concilium* shall be required, but that demurrers as well as all special cases and special verdicts shall be set down for argument, at the request of either party, with the clerk of the rules in the *King's Bench* and *Exchequer*, or secondary in the *Common Pleas*, upon payment of a fee of one shilling; and notice thereof shall be forthwith given by such party to the opposite party. Rule 8 states, that where a defendant shall plead a plea of judgment recovered in another Court, he shall in the margin of such plea state the date of such judgment; and, if such judgment shall be in a Court of record, the number of the roll on which such proceedings are entered, if any; and in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea; and in case the same be falsely stated by the defendant, the plaintiff, on producing a certificate from the proper officer or person having the custody of the records or proceedings of the Court, where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment as for want of a plea, by leave of the Court or a Judge. He contended, that the plaintiff at all events was entitled to judgment, as the defendant had not marked in the margin the number of the roll.

PARKE, B.—You ought to have signed judgment on that rule if it applies. You ought to have give a four day rule to rejoin, and for want of that the Court cannot give you judgment.

LORD ABINGER, C. B.—You are now moving for judg-

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ment on non-production of the record, and for that purpose you should have given a four day rule.

Platt applied for the costs of appearing,

But the Court, considering the act of the defendant as shewing cause in the first instance, refused to give costs.

WALKER v. LANE.

Where a cause standing in the paper is postponed at the instance of the plaintiff, on payment of costs by him, the defendant is entitled to no more costs than he would have been entitled to if the record had been withdrawn.

ERLE moved for a rule to shew cause, why the Master should not review his taxation of costs, under these circumstances. Whilst the cause was in the paper ready for trial, the defendant agreed to allow the postponement of the trial, on payment of costs of the day by the plaintiff. The cause was accordingly, by leave of the Judge, postponed; and was again put in the paper, and remained in the list three days before it was tried, when the plaintiff obtained a verdict. On the taxation of the costs of the day, it was contended by the defendant that he was entitled, not only to the usual costs of the day, but also to the costs of the three days during which the cause was in the paper; because it was alleged that that delay and the expense consequent thereon had been caused entirely by the postponement. The Master had refused to allow the costs of the three days.

Per Curiam.—We think the Master was right. The plaintiff ought not to be in a worse condition than if he had withdrawn the record.

Rule refused.

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GISBORNE v. WYATT.

THIS was an action of trespass. The declaration contained two counts for two trespasses in seizing the plaintiff's goods. To the first count the defendant pleaded that the goods were taken as a distress for 800*l.*, by virtue of a warrant of certain commissioners under an inclosure act. The second seizure was justified for a sum of 40*l.* The plaintiff took issue on these pleas, and new-assigned that the plaintiff also complained of a taking of his goods for a further sum of 300*l.* The defendant demurred specially, and, among other grounds, alleged duplicity. The plaintiff signed judgment.

Where a defendant is under terms to plead issuably, the plaintiff cannot reply double; and if he do, the Court will give leave to the defendant to assign it as cause of demurrer, and will allow it to be argued.

Amos moved to set aside the judgment.

Whitehurst shewed cause in the first instance, and contended that the judgment was properly signed, on the ground that the defendant was under terms to plead issuably, and therefore could not demur specially to the replication.

PARKE, B.—I doubt whether it was intended that the plaintiff should be allowed to reply double. Let all the special causes be struck out except duplicity, and let the demurrer be argued on the first paper day; but, as the defendant ought not properly to have demurred specially, he must pay the costs of this rule.

The rest of the Court concurred.

Rule absolute, on payment of costs.

Ultimately, upon the argument, both parties had leave to amend.

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LAWES v. HUTCHINSON.

Where judgment had been obtained in an action in the Palace Court, where the defendant was in custody, the Court would not, at the instance of the bail for the same defendant in another action in the *Exchequer*, issue a *habeas corpus* to the Palace Court, for the purpose of removing the cause there, with the body of the defendant, in order that the bail might render him in the action in the *Exchequer*.

WALSH shewed cause on behalf of *R. Taylor*, against a rule which had been obtained by *Mansel*, calling on the plaintiff and *R. Taylor* (the plaintiff in another action against the same defendant in the Palace Court) to shew cause, why a writ of *habeas corpus*, directed to the justices of the Palace Court, should not be returned and filed, and the cause in that court removed into this, and also the defendant's body; and why the bail should not have fourteen days' time to render the defendant. The action of *Taylor v. Hutchinson* in the Palace Court was removed into this Court on the 6th of *October* last, and was afterwards remanded to the Palace Court. The 21 *Jac.* 1, c. 23, s. 3, enacts, that, if any action or suit which is or shall hereafter be brought, commenced, or depending in any court of record in any city, liberty, town corporate, or elsewhere, shall be removed or stayed by any such writ of *habeas corpus*, or other writs, to be sued forth or out of any of his Majesty's courts at *Westminster*, and afterwards the same action or suit shall be remanded or sent back again by any writ or writs of *procedendo*, or other writ whatsoever, then the said action or suit shall never afterwards be removed or stayed before judgment by any writ or writs whatsoever to be sued forth or out of any of his Majesty's said Courts at *Westminster*. This cause, therefore, having been once remanded to the inferior court, cannot be removed again. The cause was so far advanced that nothing remained but to enter up final judgment, and the benefit of all would be lost if the defendant is at liberty to remove the cause again. There is another objection, that the writ was not delivered in pursuance of the 43 *Eliz.* c. 5, which directs that no writ of *habeas corpus*, or other writ to remove any cause depending in an inferior court having jurisdiction thereof, shall be received or allowed by the judges or offi-

cers of such court; but they may proceed therein as if no such writ were sued forth or delivered, except the said writ be delivered to such judges or officers before the jury have appeared and one of them is sworn; and in 2 *Archbold's Practice*, it is said that the writ must be served before any of the inquest are sworn, after a judgment by default; for which is cited 2 *Burrows*, 759. This motion, therefore, is clearly too late.

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Mansel.—This application is sworn to be made on behalf of the bail, and for their discharge. The defendant's body being in the custody of the Palace Court, the bail cannot get at him to render him. In *Waugh v. Ashford* (a), where the defendant had been committed to *Newgate* on a criminal charge, the Court ordered the time for rendering the defendant to be enlarged, in order to give the parties an opportunity of getting the defendant committed to the *Fleet*, so that he would then be within the power of the Court. The action in this Court was commenced previously to that in the Palace Court; and, therefore, the question is, whether the inferior court had a right to take the person of the defendant out of the jurisdiction of this Court, the bail having a prior right to his custody. The term "judgment" in the 21 *Jac.* 1, c. 23, may be considered to refer to *final* judgment. That act does not exclude this proceeding after final judgment. It would not be necessary that proceedings should commence *de novo*, but from the same point at which they stood in the court below. It does not appear that final judgment has been given in the court below; but if it has, we are clearly entitled to bring up the body of the defendant for the purpose of removing him. This Court has an inherent jurisdiction to remove a defendant; the defendant will come into Court

(a) Ante, p. 123.

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charged with the Palace Court action, and, if the proceedings cannot be removed, he must be remanded.

PARKE, B.—The act restricts the removal of a cause to any time before judgment; after judgment, it can only be removed by writ of error. We have no power, therefore, except for the purpose of enforcing execution under the act, to remove the proceedings after judgment, except by *certiorari* with a writ of error. A prisoner in custody of the sheriff may be brought up by the Court of *King's Bench*, because that Court has a criminal and civil jurisdiction. The bail are the legal guardians of the defendant, and they should look after their own prisoner.

Lord ABINGER, C. B.—The rule, so far as regards *R. Taylor*, must be discharged with costs.

Rule discharged as to *R. Taylor* (a).

(a) See 2 Mann. & Ryl. 366; *Hayward v. Wright*, 8 B. & C. 386.

See Baker v. Coltrick, 10 B. & C. 10.

SCOTT and Another, Assignees, &c., v. WILLIAMS.
J.C.S. 1841: 508. 2/2. M.F. 848.

Where an award found that a balance of 17*l.* was due from the plaintiff to the defendant, but contained no order on the former to pay the money, the Court refused to grant an attachment for nonperformance of the award.

E. V. WILLIAMS, on behalf of the defendant, moved for an attachment against the plaintiff, for not paying money pursuant to an award and the Master's allocatur, upon the usual affidavit of notice and a demand of the money.

R. V. Richards shewed cause in the first instance, and objected that the affidavit was insufficient, because it did not appear that a copy of the award had been served and left with the plaintiff, which was held to be necessary, before an attachment could be moved for, in the case of *Laugher v.*

Laugher (a). But the award, he contended, was so framed as not to entitle the defendant to move for an attachment. The order of reference was of the cause and all matters in difference. The award was, that no balance was due from the defendant to the plaintiffs, but that a balance of 17*l.* was due from the plaintiff to the defendant. The award, however, contained no order to pay, and, therefore, though an action might be maintained upon the award, no attachment will lie. Neither can the nonpayment of the costs be a ground for an attachment; for there is no order that the costs shall be paid to the defendant. The award merely says, "I further order and adjudge that the costs and charges of the reference and incidental thereto shall be paid by the plaintiffs at the time of the delivery of the award." It is, therefore, quite uncertain to whom the money is to be paid. But the award is altogether void, and any defence which might be taken advantage of in an action on the award, would be a good answer to a motion for an attachment. The action was brought by the plaintiffs as assignees of a bankrupt, and there was no intention to refer their personal liability. *Secondly*—The reference was to two persons, with power to appoint an umpire. The arbitrators appointed an umpire, and the award was made by one arbitrator and the umpire, though no difference existed between the arbitrators. It ought to have been made by the arbitrators, or by the umpire, or by all three.

LORD ABINGER, C. B.—Have you a right to attack the award upon this motion? If you had moved to set aside the award upon affidavits, the other side would have had an opportunity of answering the affidavits.

Richards.—According to *Thomas v. Harrop (b)*, the

(a) 2 Cr. & J. 398.

(b) 1 Sim. & Stu. 524.

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award is void. In that case, by the terms of the reference the award was to be made by four persons, or any three of them; the award purported to be made by four, but was executed by three only. The Vice Chancellor held that the award was void. Then, with regard to costs, the taxation is general, and the allocatur is generally "for costs, 26*l*. 14*s*." The rule is for an attachment for not paying 17*l*. and 26*l*. 14*s*. The award is, that the costs of the award, amounting to 15*l*., are to be paid *by the plaintiff* at the time of delivering the award; but it is uncertain on the face of the award what other costs are to be paid by him.

PARKE, B.—It is always understood, that whoever ultimately fails is to repay the costs.

Richards.—At all events, the want of an order to pay is fatal, according to *Edgell v. Dallimore* (a), where an attachment for not paying money pursuant to an award was refused, on the ground that though the award found the party to be indebted, yet it contained no order to pay the money. That case is precisely in point.

Williams, in support of the rule.—The facts of that case are not sufficiently stated in the report to enable the Court to apply it to the present case. This is a motion for an attachment for not obeying a rule of Court, by which rule the plaintiffs bound themselves to stand by the award. No one can doubt the effect and meaning of the award to be, that the plaintiffs were to pay to the defendant the sum of 17*l*. In *Stiles v. Trieste* (b), the word "paying" in an award was held to be equivalent to an express order to pay. But the principle upon which the Court proceeds in granting an attachment, is for the contempt in not obeying the rule of Court: it is so laid down

(a) 11 B. Moore, 541; 3 Bing. 634.

(b) 1 Sid. 54.

in the note to *Veale v. Warner* (a); and in the late case of *Cartwright v. Blackworth* (b) it was held by *Littledale, J.*, in the Bail Court, that a direction in an award to enter a verdict for the plaintiff for a certain sum was equivalent to an order on the defendant to pay that sum. All we claim is the 17*l.* awarded to the defendant, and the costs of the cause. With respect to the objection as to the costs, that is rather an objection to the Master's allocatur, which the plaintiffs should have applied to set aside. The award being in favour of the defendant, the costs fall on the plaintiffs.

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LORD ABINGER, C. B.—I am of opinion that we cannot make this rule absolute, as the award contains no order to pay.

PARKE, B.—I think I should not have come to the same conclusion as was come to in *Edgell v. Dallimore*; but we are bound by that case. What is a sufficient foundation for an action ought to be sufficient for an attachment.

BOLLAND, B.—I agree with the opinion, that, though an action may be brought, there is not sufficient for an attachment.

LORD ABINGER, C. B.—I do not say whether, on a full discussion, my opinion would coincide with the case in the *Common Pleas*.

Rule discharged without costs.

(a) 1 Wms. Saund. 327 c, note (3). (b) Ante, Vol. 1, p. 489.

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WILLIAMS v. ROBERTS.

A writ issued to save the Statute of Limitations may be returned *non est inventus*, and other writs issued upon it, though the defendant is about, and may be served; but the expense of such of the writs as are unnecessarily issued will not be allowed to the plaintiff.

A summons to tax an attorney's bill, though it was served, was held not to operate as a stay of proceedings from its return, so as to prevent the attorney issuing a writ, the defendant not having signed a consent in the book to pay the amount of the taxation.

THIS was an action on an attorney's bill, which was delivered on the 28th of *February*, 1834. On the 27th of *March*, a summons was taken out, calling on the plaintiff to shew cause why his bill should not be referred to be taxed, and why he should not deliver up all bills, &c. This summons was returnable on the 29th, on which day a writ was issued by the plaintiff, which was returned *non est inventus*, and then a second writ was issued against the defendant. *J. Jervis* obtained a rule *nisi* calling on the plaintiff to shew cause why the writ and subsequent proceedings should not be set aside, or why the last writ should not be set aside, and why the plaintiff should not pay the costs, on two grounds: *first*, that the first writ was issued after the summons was returnable, which, it was contended, was a stay of proceedings, and that therefore all the proceedings were irregular; and, *secondly*, that the first writ was improperly returned *non est inventus*, when the defendant was about, and the writ might have been executed by personal service. Upon the latter point he cited the words of sect. 10 of the 2 *Will.* 4, c. 89, that no first writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon or served therewith, or proceedings to or toward outlawry shall be had thereupon, or unless such writ, and every writ (if any) issued in continuation of a preceding writ, shall be returned *non est inventus*, and entered of record within one calendar month next after the expiration thereof, including the day of such expiration; and he contended that it was unreasonable that several writs should be issued at the expense of the defendant, when one would be sufficient; and, by analogy to bailable

process, as the act directs the writ to be returned by the sheriff, it must have been delivered to him, and therefore serviceable process ought also to be so delivered for the purpose of being served, and not indorsed by the attorney without an attempt to get it served. The act was intended to alter the former practice, when no attempt was made to serve the writ. He contended, that it was necessary now that there should be a *bond fide* attempt to serve the process.

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Humfrey shewed cause, upon an affidavit, that, though a summons to tax was taken out, the defendant had given no undertaking to pay, and the plaintiff was compelled to take out a writ to save the Statute of Limitations. The summons, he contended, was no stay of proceedings; and as to the right of a defendant to issue several writs without serving them, the new act authorizes a plaintiff to do so, and he is bound to do so to prevent the operation of the Statute of Limitations. By entering the proceedings on record, the defendant had an opportunity of searching the office, and would then learn whether any process was out against him. The plaintiff might not have determined whether to proceed or not, but only issued the process according to the directions of the act, as he might have done under the old process.

Jervis, in support of the rule.—*First*, the defendant had no right to proceed, because the proceedings were stayed when the summons was returnable.

PARKE, B.—You contend that a summons unattended is a stay of proceedings, and as to collateral matters; have you any authority to shew that this summons was a stay of proceedings, without a consent to pay?

Jervis.—The rule is, that a summons served is a stay of

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proceedings, after the return, until it is disposed of; and there is no authority for a distinction between different sorts of proceedings. The summons was for shewing cause at chambers at 11 o'clock; the summons never embodies an agreement to pay; that is quite a separate undertaking, which is entered in the Judge's book when the order is made (a). It was held in *Wells v. Secret* (b), that a summons, when returnable, is a stay of proceedings.

LORD ABINGER, C. B.—What proceedings were going on here? Suppose a party takes out a summons just at the end of the six years?

Jervis.—Upon the other point, the second writ was clearly irregular; for the plaintiff can have no right to sue out a writ without proceeding upon it. Under the old practice, one writ only was issued, and at any distance of time afterwards another writ might be issued; but as the new act requires a writ to be issued every four months, and recorded, a defendant might be put to an unnecessary and vexatious expense if such a practice were allowed.

PARKE, B.—That is not a necessary consequence; the Master says that the expense of those unnecessary writs would not be allowed.

Jervis.—The words of the act are “unless the defendant be served, or the writ be returned *non est inventus* ;” the latter words, therefore, must be understood to mean “provided the writ cannot be served.” There ought to be a *bond fide* attempt to serve the process; and it is more important in serviceable process, because the attorney makes the return. That will be the safer and better con-

(a) See *vide Harrison v. Ward*, K. B. P. C. post, E. T.

(b) Ante, Vol. 2, p. 447.

struction of the act, and prevent disputes afterwards about the costs.

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LORD ABINGER, C. B.—Whether actual service of the first writ was necessary depends upon the words of the section, which is in two parts. By the first part it is enacted, “that no writ issued by authority of this act shall be in force for more than four calendar months from the day of the date thereof, including the day of such date; but every writ of summons and *capias* may be continued by *alias* and *pluries*, as the case may require, if any defendant therein named may not have been arrested thereon or served therewith.” The material words come after the proviso; the proviso is quite distinct from the first part of the section, and is in these words: “That no first writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon or served therewith, or proceedings to or toward outlawry shall be had thereupon, or unless such writ and every writ (if any) issued in continuation of a preceding writ shall be returned *non est inventus* and entered of record.” There are three cases put; in the last branch nothing is said about service. I am of opinion, therefore, that the proceedings were regular.

PARKE, B.—I am of the same opinion. To sustain the argument for the defendant, there ought to be some words introduced in the first part of the proviso, such as “if he can be arrested;” but the rule is not to introduce words in construing an act of Parliament, unless the reading would be repugnant or absurd without them. The words must be read in their natural and obvious sense. Formerly, it was stated on the record that a number of writs were issued,

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which, in fact, never were issued; that is altered by the present act.

BOLLAND and GURNEY, Barons, concurred.

Rule discharged with costs, as the rule was moved with costs.

BAIN v. DE VETRY.

By the 1 W. 4, c. 22, the Court has power to issue a *mandamus* to examine a witness in *India*, where-soever the cause of action may have arisen.

I. W. SMITH moved for a rule for a *mandamus* to examine a witness in *India*. The cause of action arose in this country. Some doubts, he said, had been made whether, by the stat. 1 W. 4, c. 22, s. 1, the power of the Court as to *India* is more extensive than it was by the former stat. 13 Geo. 3, c. 63, s. 45, which was confined to actions "for which cause has arisen in *India* (a)."

PARKE, B.—Take your rule.

Cause was afterwards shewn, but no objection was made on this ground.

Rule absolute accordingly.

(a) By the stat. 1 W. 4, c. 22, s. 4, a power to issue a *mandamus*, &c. is given, "in what place or country soever the cause of action may have arisen."

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CHARLESWORTH v. RUDGARD.

THE *first* count of the declaration, which was in debt, stated that heretofore and before and at the times when the defendant acted as a commissioner, as thereafter mentioned, in the city of *Lincoln*, and county of the same city, the defendant was a commissioner for carrying into execution the act thereafter mentioned, and that theretofore, to wit, on &c. at &c. aforesaid, at a meeting of commissioners for carrying into execution an act of Parliament passed in the 9th year of the reign of his late Majesty King *George* the 4th, and intituled "An Act for paving, lighting, watching, and improving the City of *Lincoln*, and the Bail and Close of *Lincoln*, in the County of *Lincoln*, and for regulating the Police therein," then and there held at the Guildhall in the city of *Lincoln*, it was then and there ordered by the commissioners attending the said meeting that a footpath of flag stones of two flags or four feet in width, with a four inch kirk on the outer edge, be made in front of the buildings, yards, and premises, along the whole line of wharfs or roads on the east and north sides of *Brayford*, with moundsorrel crossings of the same width to the gateways, lanes, and openings, and that the necessary notices be given to the occupiers; and the plaintiff averred, that, at the time of making the last-mentioned order, and from thence until and at the time of his the defendant's acting as a commissioner, as hereinafter mentioned, he the defendant was the occupier of certain premises, that is to say, certain yards and buildings on the north side of *Brayford*, and then and there being within the jurisdiction of the said act, and lying before and adjoining the said line in the said order mentioned, the same line being then and there a public place, also within the jurisdiction of the said act; and, as the occupier of such premises, he the defendant was, during all the time last

A clause in a local act, which appointed commissioners for certain purposes, prohibited them under a penalty from acting or voting where they were personally interested. One of the commissioners being sued for the penalty, the plaintiff was nonsuited:—*Held*, that the action could not be said to be brought for "an act or thing done under the act," so as to entitle the defendant to treble costs under another clause of the act.

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aforesaid, one of the occupiers in the said order mentioned, subject, according to the said act, to make part of the said footpath, and also one of the occupiers mentioned in the proposal thereafter mentioned to have been made for the alteration of the said order; and that afterwards, to wit, on the 26th *October*, in the year aforesaid, in the city and county aforesaid, at a special meeting of the commissioners then and there held, it was proposed that the said order made at the said meeting, held on the 24th day of *July* in the year aforesaid, should be altered to the following effect, namely, that the occupiers of buildings, yards, and premises along the whole lines of wharfs or roads on the east and north sides of *Brayford*, be ordered to make footpaths the whole length of their respective frontages, with small stones and gravel, with a four inch kirb, and that the making footpaths in that manner, with mountsorrel crossings, should be deemed a compliance with the said order; and at the last-mentioned meeting, so held as last aforesaid, it was also then and there proposed that the said original order be acted upon and put in execution. And the plaintiff further said, that the said footpath so proposed as aforesaid, was, at the time of the last-mentioned meeting, and when the defendant acted as a commissioner, as thereafter mentioned, a footpath which could be made with less expense than the said footpath in the said order mentioned, and that the defendant, as such occupier as aforesaid, was, during the whole of the last-mentioned meeting, by reason of the said greater cheapness of the said footpath so proposed as aforesaid, *personally interested in the question* whether the said original order should be so acted upon or so altered as aforesaid. And the plaintiff further saith, that he the defendant, then and there being so personally interested as aforesaid, well knowing the premises, but not regarding the said statute, did, at the said meeting lastly mentioned, in the city and county aforesaid, act as a commissioner in the execution of the said act in the mat-

ter in which he was so interested as aforesaid, in this, that he, the defendant, at the last-mentioned meeting, then and there being so personally interested as aforesaid, did, as such commissioner as aforesaid, *act in execution of the said act*, on the occasion aforesaid, and then and there vote for the alteration of the said original order, according to the said proposal, contrary to the form of the statute in such case made and provided; whereby, and by force of the statute in such case made and provided, the defendant hath forfeited the sum of 100*l.*; and thereby, and by force of the statute in such case made and provided, an action hath accrued to the plaintiff to demand and have of and from the defendant the said sum of 100*l.*, parcel of the said sum above demanded. There were two other counts for penalties. The defendant pleaded *nil debet*.

At the trial, the plaintiff was nonsuited. Upon the taxation of costs, the Master taxed the defendant treble costs, under the 160th section of the 9 *Geo.* 4, c. xxvii (local act (a)).

(a) "And be it further enacted, that no action or suit shall be commenced against any person or persons for any act or thing done in execution of or under the authority of this act, after three calendar months from the time when the cause of such action shall have arisen or been committed, or have ceased and been determined; and in every such action or suit the same shall be laid, and the cause tried, in the city, county, or place where the cause of action shall have arisen or been committed, and not elsewhere. And the defendant or defendants in every such action or suit shall and may, at his or their election, plead specially, or the general issue, and give this act and the special matter in evidence at any

such trial, and that such cause of action arose or was committed in pursuance or under the authority of this act; and if the same shall so appear upon the said trial, or if such action or suit shall have been commenced before such notice shall have been given as aforesaid, or before the expiration of twenty-eight days from the service thereof, or after sufficient amends and satisfaction made or tendered as aforesaid, or after the time limited for commencing the same, or shall be commenced in any other city, county, or place than as aforesaid, then, and in any of the said cases, the jury shall find a verdict for the defendant or defendants; and upon such verdict, or if the plaintiff or plaintiffs upon the said trial shall be non-

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A rule *nisi* was therefore moved for by *M. D. Hill*, for reviewing the taxation of the Master, as to treble costs, on the ground that the 160th section did not apply to an action for a penalty. The Court having already decided that the 159th (a) section did not apply to such an action (b), they have in effect decided upon the construction of the 160th section, where the words are nearly the same. *Smith v. Wallis* (c) is precisely in point.

Adams, Serjt., shewed cause in the first instance.—The declaration expressly alleges that the defendant was a commissioner for carrying the act into effect. The act was specially intended to protect the commissioners themselves, who, it was contemplated, might be exposed to unjust and

sued, or shall discontinue his, her, or their action or suit after the said defendant or defendants shall have entered an appearance thereto, or if, upon any demurrer, judgment shall be given against the said plaintiff or plaintiffs, then, and in every such case, the said defendant or defendants shall recover treble costs, and have such remedies for recovering the same as any other defendant or defendants hath or have in other cases by law."

(a) Which enacts, "that no plaintiff shall recover in any action commenced against any person for any thing done or performed in execution of or under the authority of this act, unless notice thereof in writing shall be previously given to the person or persons intended to be sued twenty-eight days before such action shall be commenced, which notice shall be signed by the said plaintiff or plaintiffs, or his, her, or their attorney or attorneys, and shall clearly and dis-

tinctly specify the cause of such action, nor shall such plaintiff or plaintiffs recover in any such action if tender of sufficient amends shall have been made to him, her, or them, or to his, her, or their attorney, by or on behalf of the said defendant or defendants, before such action shall be commenced; and in case no such tender shall be made, it shall be lawful for the said defendant or defendants in any such action, by leave of the court, at any time before issue joined, to pay into court such sum or sums of money as he, she, or they shall think proper; whereupon such proceedings, order, and judgment shall be made and given in and by such court, as in other actions where the defendant is allowed to pay money into court."

(b) *Charlesworth v. Rudgard*, 4 Tyrwhitt, 824; 1 Cr. M. & R. 498, S. C.

(c) 1 T. R. 252.

vexatious actions; they would naturally be the first object of the legislature. The case of *Smith v. Wallis* is very different. The defendant there was not an officer acting under the act; he had nothing to do with the act. Here the defendant was an officer acting under the act, and committing an error. The words of the 160th clause comprehend "any act or thing done in execution of or under the authority of the act." Can it be said that he did not act under the authority of the act?

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PARKE, B.—The action here was for doing something in disobedience of the act—for acting in execution of the act when he was personally interested. These clauses are very common, and it has never been contended that they apply to actions for penalties. The objection here is, that the act was not done under the authority of the act. The clause is not confined to officers, but extends to any act or thing done in pursuance of the act.

Adams, Serjt.—The declaration charges the defendant with having done an act as a commissioner; and the plaintiff being nonsuited, it must be presumed that the charge of having acted contrary to the act was false. The words of the two sections are different, and the object of them is different. Though this may be an action in which the defendant could not tender amends, it may be proper that he should be protected from the costs. The action is founded on the 13th section, which gives the penalty and limits the action to three months; and the 160th section gives treble costs if the action is brought after three months. It is evident that the actions mentioned in section 13 were intended to be included in the 160th section.

Hill, in reply.—It is impossible to support the proposition that the same words are to receive one construction for one purpose, and a different construction for another.

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purpose. There is no real difference between the words used in the two sections: "act" and "thing done" are synonymous. *Umphelby v. M'Lean* (a) is an authority in favour of the motion. That was *assumpsit* for money had and received, brought to recover the amount of an excessive charge made by the defendants, as collectors, on a distress for arrears of taxes; and it was held that the defendants were not entitled to a month's notice before action brought under the stat. 43 Geo. 3, c. 99, s. 70, which provides that no writ or process shall be sued out for any thing done in pursuance of that act till after one month's notice; and *Willett v. Tiddy* (b) is an authority to shew that, if the defendant does not use the statute in his defence, he does not come within the clause giving treble costs. The argument on the other side involves this inconsistency, that the act charged against the defendant was not an "act done" so as to enable the plaintiff to sustain this action against the defendant, but that it is an "act done" for the purpose of enabling the defendant to claim treble costs in consequence of the nonsuit. The infliction of treble costs is in the nature of a penalty; and therefore the Court, in a case of doubt, will construe the words of the act strictly.

PARKE, B., on the last day of term, gave judgment.—In this case we think the rule ought to be made absolute. This was an action for penalties, and the plaintiff, on the second trial, was nonsuited; and the question is, whether the defendant is entitled to treble costs on the 160th section. We think that section does not apply. On the former occasion (c), the Court thought that the 159th section did not apply to an action for penalties. That

(a) 1 B. & Ald. 42.

(b) 12 Mod. 6.

(c) See *Charlesworth v. Rudgard*, 4 Tyrwh. 831. The ques-

tion there before the Court was, whether notice was necessary before bringing the action.

section says, that no plaintiff shall recover for any thing done or performed in execution of or under the authority of the act, unless notice thereof, in writing, has been previously given. The ground of the decision was, that the object of the notice was to enable a party to tender amends. The words of the 160th section are almost identically the same. That section is inapplicable to many cases. It enacts that no action shall be commenced for any act or thing done in execution of or under the authority of the act, after three calendar months from the time when the cause of such action shall have arisen; and upon such trial, if the plaintiffs shall be nonsuited, the defendant shall recover treble costs. The words are not exactly the same as in the former section, but nearly so. All these enactments are clearly intended to apply to those cases where the act done is in pursuance of the directions of the act, and not to actions for penalties for doing what the act prohibited. The case in *Viner's Abr.*, title, *Costs*, *l. pl. 18 (a)*, was an action for a penalty for acting as a commissioner of the land tax, not having 100*l. per annum*. The plaintiff was nonsuited; the defendant had his costs taxed and paid by the plaintiff, and a receipt was given. Afterwards the defendant, apprehending that he was entitled to treble costs, got the Judge who tried the cause to certify that he was an acting commissioner, whereupon he had treble costs taxed, and took the plaintiff in execution for nonpayment of them; to set aside which, the Court was moved; and the Court held that the defendant had concluded himself by receiving single costs, and that therefore the execution was bad. There was no decision upon the point raised, and that case therefore cannot be considered as an authority either way. On the other hand, there is the case of *Wright v. Horton (b)*, which was an action against justices of the peace for acting as such with-

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(a) *Vincent v. Strode*.(b) *Holt*, N. P. C. 450.

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out being qualified; and Mr. Baron *Wood* held that notice of action was not necessary. We, therefore, think that this rule should be made absolute.

Rule absolute.

BYASS v. WYLIE.

In assumpsit on a bill of exchange, by the drawer against the acceptor, the defendant pleaded that, at the time of the defendant giving the bill of exchange, it had been agreed that the plaintiff should consign certain goods to *J. N.* abroad, to be there sold, and that the defendant should accept the bill, but that the amount should be remitted to the defendant out of the proceeds of the goods; and that if the goods should not be sold, or the proceeds received before the bill arrived at maturity, that the bill should be renewed.

The plea then averred that the proceeds had not arrived, and that the bill became due, and that the defendant offered to give a renewed bill, but that the plaintiff refused to take it, and requested that the defendant, in lieu thereof, would write a letter relinquishing his right to receive the proceeds; which letter the defendant accordingly wrote. The plea then concluded by averring that the defendant had not received any value or consideration for the payment of the bill of exchange:—*Held*, upon special demurrer, that the plea was not bad for duplicity, and that it was a good plea of accord and satisfaction; but that the averment that the defendant had received no consideration was repugnant.

ASSUMPSIT by drawer and payee against the acceptor of a bill of exchange, payable six months after date, with the common counts. The *second* plea to the first count was as follows:—"The defendant says, that before and at the time of the making of the bill of exchange and acceptance thereof by the defendant, in the first count mentioned, to wit, on the day and year first aforesaid, it was agreed by and between the plaintiff and the defendant, that the said plaintiff should consign certain goods, to wit, 500 gallons of bottled porter, and 500 gallons of wine, and certain other merchandizes, in the whole of great value, to wit, of the value of 300*l.*, to one *James Norman*, in parts beyond the seas, to wit, in the *West Indies*, to be there sold and disposed of, and that the said defendant should accept the said bill in the said first count mentioned, and deliver the same to the plaintiff, in order that the said plaintiff might procure the same to be discounted, and receive the amount thereof to and for his own use and benefit. And it was also then agreed between the plaintiff and the defendant, that a certain sum of money, to wit, the sum of

120*l.*, being a sum equal to the amount of the said bill of exchange, should be remitted and paid to the defendant out of the proceeds of the goods so consigned as aforesaid, when the same should have been sold and disposed of, in order to enable the defendant to pay the said bill when the same should have arrived at maturity, and the plaintiff should write a letter to the said *James Norman*, requesting him to remit and pay to the defendant the said sum of 120*l.*, being the amount of the said bill of exchange, for the purpose of paying the said bill when it should have arrived at maturity; and it was also then agreed between the plaintiff and defendant, that, in case the said goods should not have been sold and disposed of, and the proceeds of the said sale should not have arrived in *England* at the time when the said bill should have become payable, that then the said bill should be renewed, and the said defendant should, in lieu thereof, accept another bill, to be drawn upon him, payable at a future time, in order that the said defendant might not be called upon to pay the amount of the said bill before the said goods should have been so sold and disposed of, and a sufficient sum to satisfy the amount of the said bill should have been paid to or come into the hands of the defendant, out of the proceeds of the said sale. And the defendant further saith, that, in pursuance of the said agreement so made as aforesaid, the said plaintiff did afterwards, to wit, on the day and year aforesaid, consign the said goods to the said *James Norman*, who accordingly received the same for the purpose of being sold and disposed of as aforesaid, and the said defendant then accepted the said bill of exchange in the said first count mentioned, on the terms aforesaid; and the plaintiff did then write a letter to the said *James Norman*, requesting him to remit and pay to the defendant the sum of 120*l.* out of the proceeds of the goods so consigned as aforesaid, when the same should have been sold and disposed of, for the purpose of enabling him the

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said defendant to pay the amount of the said bill of exchange when it should become due and payable. And the defendant further says, that afterwards, to wit, on the 29th of *September*, in the year aforesaid, the said bill of exchange in the first count mentioned became due and payable, and the proceeds of the said goods so consigned as aforesaid had not arrived in *England*, and the defendant then was, and from thence hitherto hath been, ready and willing to renew the said bill, and to accept another bill in lieu thereof, to be made and drawn on him the said defendant, in manner and on the terms aforesaid, of all which premises the plaintiff then had notice; but the defendant in fact saith, that the said plaintiff then declined to draw any bill upon the defendant to be accepted by him in lieu of the said bill of exchange in the first count mentioned, and so due and payable, or to receive from the defendant any such bill so accepted; and the plaintiff then requested the defendant, that, in lieu of paying the said bill in the said first count mentioned, or renewing the same, he, the said defendant, would write a letter to the said *James Norman*, for the purpose of relinquishing all right and claim on the part of him the said defendant to receive the said sum of 120*l.*, or any part thereof, out of the proceeds of the said goods, so consigned as aforesaid, and requesting the said *James Norman* to remit and pay to the plaintiff the whole of the proceeds of the said goods. And the said defendant did accordingly afterwards, to wit, on the day and year last aforesaid, write a letter to the said *James Norman*, and deliver the same to the said plaintiff, whereby he, the said defendant, did relinquish and give up all right and claim to receive the said sum of 120*l.*, or any part thereof, out of the proceeds of the goods so consigned as aforesaid, and did request the said *James Norman* to pay the whole of such proceeds to the plaintiff, and the said plaintiff then accepted and received the said letter. And the defendant saith, that he hath not received any

value or consideration for the payment by him the said defendant of the bill of exchange in the first count mentioned. And this he is ready to verify."

Special demurrer, alleging for causes that the agreement stated in the plea was inconsistent with the tenor of the bill itself; that the plea was double, and contained two answers, *first*, that the bill was given on an agreement for renewal, and that the plaintiff had refused to accept a renewed bill; and *secondly*, that the plaintiff had requested the defendant, in lieu of payment, to write a certain letter, and that the plaintiff accepted the letter; and that the plea amounts to accord without satisfaction; and also that it is repugnant, as in the first part it shews that there was a consideration for the bill, which is alleged to have partly failed, and afterwards alleges that the defendant has received no consideration for the bill.

Cleasby, in support of the demurrer.—*First*, the plea is bad for duplicity: it contains two defences, that is, two answers, either of which would be good if properly pleaded. That the insufficiency of pleading does not prevent doubleness, appears from *Bac. Abr. Pleas, K. 2*, and *Sid. 125*. The plaintiff will have a difficulty in dealing with the plea, for it is difficult to say that the first part can be rejected; and the second part alleges badly accord and satisfaction.

LORD ABINGER, C. B.—The plea states the whole transaction. It does not appear that either part of the plea alone would be a good defence.

PARKE, B.—The whole plea is accord and satisfaction. So much of it as relates to the renewal may be considered to be surplusage. It is not said that it was agreed in writing.

Cleasby.—*Secondly*, the plea is repugnant in alleging that there was no consideration for the bill.

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Wightman, (with whom was *Hughes*), endeavoured to obviate this latter objection, on the ground that the plea merely alleged that the defendant had received no consideration *for the payment* of the bill, which admitted that there might have been a consideration for the acceptance.

The Court, however, expressing a strong opinion in favour of this latter objection, the defendant had leave to amend (a).

Leave to amend.

(a) It seems difficult to understand how the transaction stated in the plea upon the occasion of the bill being given, viz., the sending out goods by the plaintiff to a third person abroad, the proceeds of which were to be paid into the defendant's hands before he could be called on to pay the bill, can be said to shew a consideration

received by the defendant, so as to make the latter part of the plea repugnant with the former part of it by reason of the averment *that the defendant had received no consideration for the payment of the bill*. See *Easton v. Pratchett*, ante, p. 472, where the meaning of the words "received" and "consideration" were fully discussed.

END OF HILARY TERM.

KING'S BENCH PRACTICE COURT.

Easter Term,

IN THE FIFTH YEAR OF THE REIGN OF WILLIAM IV.

GLYNN and Others v. HUTCHINSON.

(Before the four Judges.)

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THIS was a rule calling upon the plaintiffs, and the plaintiff in an action in the Palace Court, respectively to shew cause why the writ of *procedendo*, issued herein, should not be quashed, and why the writ of *habeas corpus* to remove the cause should not be duly returned; and why the bail of the defendant in this action should not have fourteen days after the determination of the custody of the defendant in the Palace Court, to render the defendant in this action.

It is no objection to a *habeas corpus* that the attorney suing it out was not on the roll.

The 21 Jac. 1, c. 23, s. 3, as to *procedendo*, does not extend to applications by bail.

The plaintiffs in this cause did not appear.

Walsh shewed cause for the plaintiff in the action in the Palace Court.—The *procedendo* was granted upon the ground that the attorney suing out the *habeas* had not taken out his certificate. The bail have no right to apply to set aside proceedings; and a *procedendo* having been awarded, the cause cannot again be removed before judgment. By the 21 Jac. 1, c. 23, s. 3, it is provided, that “if any such action, bill, plaint, suit, or cause, which is or shall hereafter be brought, commenced, or depending in any such court of record in any city, liberty, town corporate, or elsewhere, shall, after the end of this present session of Parliament, be removed or stayed by

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any such writ or writs, process or processes, to be sued forth or out of any of his Majesty's Courts at *Westminster*, or the court of the great sessions in *Wales*, or any other court as aforesaid; that if afterwards the same action, bill, plaint, suit, or cause shall be remanded or sent back again by any writ or writs of *procedendo*, or other writ whatsoever; that then the said action, bill, plaint, suit, or cause shall never afterwards be removed or stayed before judgment by any writ or writs whatsoever to be sued forth or out of any of his Majesty's said courts at *Westminster*, or the said court of great sessions in *Wales*, or any other court as aforesaid." Final judgment does not appear to have been signed, and it would be a great hardship upon the plaintiff in the court below if his proceedings were now vacated.

Mansel, in support of the rule.—The *procedendo* was irregular. The objection that the attorney had not taken out his certificate was immaterial, as was decided in *Hilleary v. Hungate*, Bart. (a), by *Littledale*, J., who held, that though an attorney is not upon the roll, yet the proceedings are not affected by it. The bail are interested in the custody of the defendant, and are entitled to remove his body into this Court, in order to render him in this action. The Court can then remand the defendant to his former custody, charged with this action. This Court has a power, not possessed by the other superior courts of common law. It can remove a cause by writ of error, and bring up a prisoner in criminal custody to charge him in a civil action.

Per Curiam.—The objection to the *habeas*, that the attorney had not taken out his certificate, is not tenable, as the party ought not to be affected by the omission of the

(a) Ante, p. 56.

attorney. The *procedendo* must therefore be quashed, and the *habeas* must be returned. The proceedings which have taken place in the Palace Court since the issuing the *habeas* are nugatory. The statute of *James*, prohibiting the removal of causes from inferior courts, except under certain restrictions, does not appear to us to apply to the bail of the defendant; and we see no objection to their bringing up the principal, in order to render him in an action in the Court above.

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Rule absolute for the return of the *habeas corpus* to remove the cause.

ROBINSON v. LESTER.

ADDISON moved for leave to sign judgment on an old warrant of attorney. The affidavit stated that the defendant was alive on the 8th of *April*, the term commencing on the 15th. Since the promulgation of the rules of *Hilary Term*, 4 *Will. 4* (a), the doctrine of relation had ceased to exist, and, therefore, it was no longer necessary that the defendant should appear to have been alive within the term. He cited *Cockman v. Hellyer* (b), wherein a similar motion had been allowed on a similar affidavit.

Since the rules of *H. T. 4 W. 4*, s. 1, reg. 3, it is not necessary, in order to sign judgment on an old warrant of attorney, to shew that the defendant was alive within the time.

WILLIAMS, J.—That will do. You may take your rule.

Rule granted.

(a) Ante, Vol. 2, p. 313.

(b) Ante, Vol. 2, p. 816.

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UNITE *v.* HUMPHREY and Others.

If a plaintiff's proceedings on a writ of summons are stayed by rule, he is bound to declare within a year after the expiration of that rule, or he will be out of Court.

THIS was a rule obtained by *Holt*, calling upon the plaintiff to shew cause, why the proceedings in this action should not be stayed, upon the ground that the plaintiff had declared after the lapse of a year from the service of the writ of summons, which was irregular under the 1 *Reg. Gen. H. T. 2 Will. 4*, s. 35 (*a*).

Mansel shewed cause.—The writ of summons issued *May 25th*, 1833. The action is in trover, against the defendants as sheriff of *Middlesex*, for seizing the horses and harness of the plaintiff. On *June 12th*, the Court of *Common Pleas* granted a rule to shew cause at chambers for relief of the plaintiff, under the Interpleader Act, 1 & 2 *Will. 4*, c. 58, s. 6, with a stay in the meantime of *all* proceedings against the sheriff. On *June 14th*, an appointment was attended, under the rule, before *Gaselee, J.*, when it was arranged that the parties should file affidavits. One affidavit only was made by one of the parties. Applications were from time to time made, requesting the opposite parties to proceed with the rule, but without avail, until *September*, 1834, when an appointment was procured before *Bolland, B.* The parties attended, and his Lordship was of opinion that he had (unless by consent) no jurisdiction under the 6th section of the Interpleader Act. The plaintiff was willing to consent, but the other parties refused. In *Michaelmas Term*, 1834, an application was made to the Court of *Common Pleas*, under the rule, to discharge so much of it as stayed the proceedings in this action, when the Court said, that the rule had expired, and

(*a*) "A plaintiff shall be deemed to be returnable." Ante, Vol. 1, p. 187.
out of Court, unless he declare within one year after the process

that the plaintiff must go on with his action; and a declaration was delivered *December 22nd*, 1834. The proceedings being stayed by the rule from *June 12th*, 1833, down to *Michaelmas* Term, 1834, such time could not be reckoned within the year; and, therefore, as, by rejecting that intermediate period, the plaintiff would have declared within the year, his declaration was regular.

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Holt, in support of the rule, was stopped by the Court.

PATTESON, J.—It seems to me, that the rule granted by the Court of *Common Pleas* expired at the end of the vacation of *Trinity* Term, 1833; and it is not shewn that the present defendants acted upon it afterwards. The plaintiff has declared after a year has elapsed from the service of the summons, and therefore, the proceedings must be stayed.

Rule absolute.

BAYLIS v. HAYWARD.

THIS was a rule obtained by *Mansel*, for setting aside a judgment signed against the defendant in *scire facias*, for irregularity, with costs. The ground upon which it had been signed was, for not returning the demurrer book. Notice had been given upon the back of the demurrer book, that the defendant was to return it in four days, or judgment would be signed.

It is not necessary for a party in a *sci. fa.* to return the demurrer book; and, therefore, a judgment signed for not returning it is irregular.

R. Alexander shewed cause.—The plaintiff having demurred to the defendant's plea, had a right to add a joinder in demurrer (a), as was done by the clerk of the

(a) R. T. 1 G. 2.

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papers, when he formerly made up the paper book, in which case he inserted in the margin a rule for the return of the paper book in four days, and, if not then returned, the plaintiff might sign judgment as for want of a plea. The rules 5 *Reg. Gen. H. T. 4 W. 4*, (Practice Rules) (a), direct, that "The issue or demurrer book shall, on all occasions, be made up by the suitor, his attorney, or agent, as the case may be, and not, as heretofore, by any officer of the court." The notice in the present case was in lieu of the rule formerly used; and the defendant having kept the demurrer book, the plaintiff had a right to sign judgment.

Mansel, in support of the rule.—The pleadings, issues, and demurrer book, in *scire facias*, were always made up by the attornies (b); and, therefore, the rule given by the clerk of the papers in other cases never was given in *scire facias*. The plaintiff had no right to add a joinder in demurrer for the defendant; but he should have demanded, under 3 *Reg. Gen. H. T. 4 W. 4*, (Practice Rules) (c), a joinder in demurrer—"No rule for joinder in demurrer shall be required, but the party demurring may demand a joinder in demurrer, and the opposite party shall be bound, within four days after such demand, to deliver the same, otherwise judgment."

PATTERSON, J.—The plaintiff was clearly irregular in signing judgment for not returning the demurrer book. The rules *Hil. 4 Will. 4* have ordered that the demurrer book is to be delivered by the plaintiff's attorney, which must mean that it is to be kept by the defendant's attorney. The judgment is, therefore, irregular, and must be set aside.

Rule absolute.

(a) Ante, Vol. 2, p. 305.

(b) Rules 12 Will. 3.

(c) Ante, Vol. 2, p. 304.

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DAKINS v. WAGNER.

THIS was a rule obtained by *Mansel*, for setting aside an interlocutory judgment signed, with costs, for irregularity. Mr. Justice *Patteson* had made an order in the following form:—"I do order that the defendant shall have *till Tuesday* next time to plead." Upon the *Monday* night the defendant delivered a plea, but without a date, and the plaintiff's attorney, without returning it, signed interlocutory judgment as for want of a plea.

A plaintiff has no right to sign judgment for want of a plea, before the time for pleading is out, although a bad plea may have been delivered.

Semble, that the word "till" is inclusive of the day to which it is prefixed.

Barstow shewed cause.—The plea was a nullity, not being in conformity with 1 *Reg. Gen. H. T. 4 W. 4*, (Pleading Rules) (a)—"Every pleading, as well as the declaration, shall be intitled of the day of the month and year when the same was pleaded, and shall bear no other time or date." The plaintiff had, therefore, a right to sign judgment. The defendant had already pleaded, and could not waive it without leave of the Court or a Judge (b).

Mansel, in support of the rule.—The omission was a mere irregularity, not a nullity, and did not authorize the plaintiff to sign judgment; and, at all events, the judgment was signed too soon; as, if the plea was a nullity, the defendant might, at any time during the *Tuesday*, have delivered an amended plea. The word *till* properly includes the day to which it refers. 8 *Reg. Gen. H. T. 2 W. 4* (c). In *Pepperell v. Burrell* (d), it was held, that, upon an order for seven days' time to plead, the defendant has seven days exclusive of the day of the date of the order; and, that, although a bad plea be delivered prematurely, the

(a) *Ante*, Vol. 2, p. 313.

(c) *Ante*, Vol. 1, p. 200.

(b) 1 *Reg. Gen. H. T. 2 W. 4*, s.

(d) *Ante*, Vol. 2, p. 674.

46, *ante*, Vol. 1, p. 188.

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plaintiff must wait until the time for pleading is out, before he can sign judgment.

PATTESON, J.—I meant the word “till” to include the *Tuesday*. The plaintiff was irregular in signing judgment on that day, as the defendant might have delivered an amended plea during that day. The rule must be absolute.

Rule absolute.

WEEKES v. WHITELEY.

Mere violent snatching an original writ of summons from the person serving a copy of it, is not a contempt of the process of the Court.

WIGHTMAN shewed cause against a rule obtained by *Humfrey* for an attachment against the defendant for contempt of the process of the Court. The facts, as they appeared on the affidavits in support of the rule, were these. A writ of summons was sued out by the plaintiff against the defendant, and a person who made an affidavit in support of the application was employed to serve the writ. Having found the defendant, he served him with a copy of the writ, at the same time producing the original. The defendant snatched the original out of the deponent's hand, and put it in his pocket. This snatching was effected with considerable roughness and violence. The deponent then asked the defendant for the original writ, which was refused for some time. He ultimately, however, gave it to the deponent. This, it was contended, was no contempt of the process of the Court. It might, perhaps, amount to an assault, but the proper remedy for that offence was an indictment or an action; but the Court could take no notice of it as a contempt of its process.

Humfrey, contra, submitted, that such conduct towards

a person serving the process of the Court, and towards the process itself, must be considered as a contempt.

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WILLIAMS, J.—I do not see how this is a contempt of the process of the Court. It does not appear that the defendant said he did not care for the authority of the Court, or that its process was valueless. The sole question between the parties appears to be, the degree of violence used on the occasion. But, if there was violence, it is not shewn that any contempt was intended towards the process of the Court. The present rule appears to have been obtained on vexatious and frivolous grounds, and, therefore, I think it ought to be discharged, with costs.

Rule discharged, with costs.

SEATON v. SKEY.

JOHN JERVIS shewed cause against a rule *nisi* obtained by *W. H. Watson*, requiring the plaintiff to shew cause why the interlocutory judgment signed in this case for want of a rejoinder should not be set aside. The objection to the judgment was, that it had been signed for want of a rejoinder, without any demand of one. This, he contended, was not necessary, as the defendant was under terms to take short notice of trial, and to rejoin *gratis*. The necessity, therefore, of demanding a rejoinder was removed by the terms under which the defendant was placed.

Although a defendant is under terms to rejoin *gratis*, and take short notice of trial, the plaintiff cannot sign judgment of *non pros* for want of a rejoinder, unless a demand for that purpose has been made.

W. H. Watson, in support of the rule, contended that the plaintiff was bound, notwithstanding the terms under which the defendant was placed, to demand a rejoinder before he signed a judgment of *non pros*. The only effect and meaning of rejoining *gratis* was to enable the plaintiff

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to add the *similiter*, and make up the issue himself, in order to prevent delay in going to trial. But, if the plaintiff, instead of proceeding to trial, thought proper to sign judgment of *non pros*, he must make a demand of rejoinder. He cited *Wye v. Fisher* (a), where a plaintiff, having tendered an issue to a plea, and demanded a rejoinder where the defendant was under terms to rejoin *gratis*, the Court held the judgment regular, but set it aside without costs, because the plaintiff might have added the *similiter* himself.

WILLIAMS, J. (after consulting with Master *Bunce*).—The case referred to on the part of the defendant is in point with the present. It seems to me, therefore, that I ought to act upon it, and make this rule absolute, though without costs.

Rule absolute, without costs.

(a) 3 Bos. & Pul. 443.

FARLEY v. HEBBES.

If the attorney on the record is changed, without an order for that purpose, but the opposite party treats the new attorney as the attorney in the cause, he cannot afterwards object that no order was obtained.

R. v. RICHARDS shewed cause against a rule obtained by *Humfrey* for discharging a rule *nisi* for judgment as in case of a nonsuit. The ground of the application was, that the rule had been obtained by a different attorney from the one by whom the defendant had pleaded, without any order for the change of attorney. He contended, that, under the circumstances of this case, no order for the change of attorney was necessary. The facts of the case were these. The defendant's attorneys were originally Messrs. *Pasmore & Taylor*. They appeared in the action by the name of their firm, as was the usual course. After declaration, the name of Mr.

Pasmore was used as the attorney by whom the plea was pleaded. Subsequently, Messrs. *Pasmore & Taylor* dissolved partnership, and then, in the ulterior proceedings, the name of *Taylor* was substituted. On one occasion, a summons was taken out by Mr. *Taylor*, as the attorney in the cause, and it was attended by the plaintiff's attorney at chambers. The plaintiff did not proceed to trial pursuant to his notice, and therefore a rule for judgment as in case of a nonsuit was obtained by Mr. *Taylor*, on behalf of the defendant. It was now sought to discharge that rule, on the ground that no order had been obtained for changing the attorney in the cause. He submitted that this was not a case in which such an order was necessary. The name of Mr. *Pasmore* had only been used for the convenience of the firm; for the name of either partner might have been used indifferently. Mr. *Taylor* was, therefore, to be considered as much the attorney of the defendant as Mr. *Pasmore*. If his name had been used instead of that of Mr. *Pasmore*, there would have been no pretence for the present application. But it was now clearly too late to make the objection, after attending a summons taken out by Mr. *Taylor* in the cause, as that must be considered a clear waiver of any supposed irregularity on the part of the defendant. The plaintiff could not treat Mr. *Taylor* as the defendant's attorney for some purposes, and not for others. The present rule ought, therefore, to be discharged.

Humfrey, in support of the rule, contended that an order for changing the attorney ought to have been obtained previous to moving for the rule for judgment as in case of a nonsuit. It was unimportant whether the new and the old attorney had been once joint members of the same firm which had appeared in the action. Mr. *Taylor* and Mr. *Pasmore* were, for the purposes of this action, as different persons as if they had never been in any way connected. Mr.

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Pasmore appeared in the plea as the attorney on the record. Then, without any order for the change of attorney, Mr. *Taylor* appeared in the conduct of the defendant's case. Such a course was quite as much within the mischief contemplated by the rule as any change of attorney could be. The object of the rule was, to prevent a party from being harassed by a number of attorneys appearing for his opponent. Here, the plaintiff was to be harassed by two attorneys, without receiving any notice of the change. The present rule ought, therefore, to be made absolute.

WILLIAMS, J.—It seems to me that the ordinary rule does not apply to this case. Mr. *Taylor*, it appears, was the attorney of the defendant in effect from the beginning to the end of the proceedings; he being in partnership with Mr. *Pasmore*. The firm of *Pasmore & Taylor* was then dissolved; and some steps in the cause subsequently taken by *Taylor* were recognised on the part of the plaintiff's attorney: for he attended a summons which *Taylor* took out. With regard to changing the attorney, I do not know very well how it could be performed. There were two attorneys acting in the suit up to a certain time. First, one takes a step in the suit, and then another takes a step. I do not perceive that any uncertainty or inconvenience has been suggested, as resulting from Mr. *Taylor's* name being substituted for that of Mr. *Pasmore*, without an order for that change. After attending the summons, and thus recognising the new attorney, I cannot allow the plaintiff to object to the omission of an order to change. The present rule must, therefore, be discharged, with costs.

Rule discharged, with costs.

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DOE *d.* GEORGE *v.* ROE.

HUMFREY moved for leave to sign judgment against the casual ejector. The affidavit on which he moved stated, that the deponent had gone to the premises in question, where he saw the wife of the tenant. He gave her the declaration in ejectment through the window of the house. As soon as she received it, she shut down the window and went away. The deponent was thus unable to give her any explanation, or to read over the notice,

If the wife on the premises has received the declaration, and prevents the person serving it from giving an explanation, or reading it over, the service is sufficient.

WILLIAMS, J.—If she would not be informed of the meaning of the proceeding, the person endeavouring to effect the service could not compel her. You may take your rule.

Rule granted.

HARRISON *v.* WARD.

ERLE shewed cause against a rule *nisi* obtained by *Maule*, for an attachment for nonpayment of costs, pursuant to the Master's *allocatur*. He objected, that the Judge's order, on the authority of which the Master had proceeded, contained no undertaking to pay what should be found due on taxation. The party against whom the rule *nisi* for the attachment had been obtained, had not undertaken to do any thing, and, therefore, could be guilty of no neglect in not paying costs, which he had never undertaken to pay. In order to render a party liable to the summary proceeding of an attachment, he must have entered into the undertaking to pay what should be found due on taxation; if he had not, the party claiming the costs had only his remedy by action.

An attachment cannot be obtained for nonpayment of costs, pursuant to the Master's *allocatur*, if there was no undertaking, in the Judge's order for taxation, to pay what should be found due.

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Maule (with whom was *Petersdorff*) contended that such an undertaking was not necessarily introduced into the order, which had been made a rule of Court; as the order itself could not be obtained without the party applying for it giving such an undertaking, which was entered in the book at the Judge's chambers.

Erle, contra, submitted, that, as the order, which had been made a rule of Court, and on which consequently the power of the Court to grant an attachment depended, did not contain the undertaking, it was immaterial what might exist in the book at the Judge's chambers.

WILLIAMS, J. (after consulting with Master *Bunce*).—I think that, as no undertaking to pay what shall be found due on taxation is contained in the Judge's order, I cannot consider the party liable to an attachment for not paying the amount at which the costs have been taxed. The present rule must, therefore, be discharged.

Rule discharged (a).

(a) With respect to the undertaking to pay what shall appear due on taxation, there is no entry of such undertaking made in the book at the Judge's chambers. An undertaking signed by the party desirous of taxing is filed with the Judge's clerk, and serves for instructions to draw up the order for taxation. The substance of the undertaking is generally contained in the printed part of the Judge's order. It was somewhat extraordinary, therefore, in the above case, that it should have been struck out. The course then open to the party seeking to enforce the payment of the costs,

would be, to obtain the original undertaking from the Judge's chambers, and make that a rule of Court. He must then serve a copy of that rule, and of the other rule already obtained, with the Master's *allocatur* indorsed thereon, upon the person resisting the payment of the costs. He must, of course, make a demand, and comply with all the forms required, in order to obtain an attachment, in the same manner as if it was an original proceeding. The undertaking in the present case was afterwards made a rule of Court.

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ROBINS *v.* HENDER.

SIR WILLIAM FOLLETT shewed cause against a rule obtained by *John Jervis* for discharging the defendant out of custody on the ground of his having been previously arrested for the same cause of action. He admitted, that the general rule was, that a party could not be arrested twice for the same cause (a). But, in the present instance, no arrest had taken place on what was called the first occasion, and consequently that which was alleged to be the second arrest was the only arrest, and therefore the defendant was rightly in custody. The facts, as they appeared on the affidavits, were these:—When the plaintiff sued out his *capias*, he requested the sheriff, and the sheriff complied with his request, that the warrant should be directed to his own bailiff. The name of this bailiff was *Medland*. He, in company with his own son, and a person named *Lee*, a clerk of the plaintiff, proceeded to *Callington*, at which place they found the defendant. They then entered into conversation with him, and told him, he must go with them, unless he would make an assignment of certain property, to which he was entitled, in favour of the plaintiff. This, however, he refused to do, unless certain terms were engrafted on the assignment. The defendant then proposed, that *Lee*, the plaintiff's clerk, should go and ask his master, whether he would agree to such terms. The clerk then said, "How am I to know that you will not run away, while I am gone to speak to my master? You must, however, remain with *Medland* here." The clerk then went away for the purpose of communicating with his master. It was now approaching night, and *Medland* proposed, that the defendant should go and sleep at the house of his sister-

Semble, that, in order to constitute an arrest, the warrant must be produced; but the closest watching of the defendant is not sufficient.

(a) See 1 Reg. Gen. H. T. 2 W. 4, s. 7, ante, vol. 1, p. 184.

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in-law, but that *Medland's* son should go with him, and sleep in the same room. This proposal was acceded to, and accordingly, *Medland's* son and the defendant went to bed in the same apartment. In the course of the night, the son being desirous of leaving the room for a short time, told the people of the house to keep an eye upon the defendant, and not to let him go. The next morning the arrangements between the plaintiff and the defendant having been completed, the bailiff and his son, together with the clerk, left the defendant. Subsequently, it being discovered, that the defendant was about to leave this country for *America*, the arrest on which he was now detained took place. These facts, he contended, did not amount to an arrest. The whole together only constituted a close watching of the defendant. No warrant was produced, and nothing said to the defendant which could constitute an arrest without producing the warrant. The officer received the warrant, and kept it in his pocket; and the instructions of the plaintiff, therefore, must be presumed to have been, "You are to watch him closely, and if he attempts to free himself from that watching, you will arrest him." But as the defendant never did free himself from their close attendance, the arrest was never effected. There was nothing to prevent his going away, and he was never even told that he was in custody. Having never been arrested more than once, there was no reason for discharging the defendant from his present arrest.

John Jervis, in support of the rule, contended, that the course pursued by the parties intrusted with the execution of the warrant, amounted in point of law to an arrest. It was not necessary, that the person of the defendant should be actually touched in order to constitute an arrest; but all that could constitute an arrest, except actual personal contact, had here been done.

WILLIAMS, J.—The only question here for the consideration of the Court is, whether on the former occasion there was or was not an arrest effected under the warrant. It is quite clear, that the general rule is, that if a party has been once arrested, he cannot be arrested again for the same cause. If the fact of an arrest on the former occasion were made out, it would not be competent for the parties without leave to arrest him a second time. Now, there is no doubt the persons employed on the former occasion had instructions to take the defendant into custody, if he attempted to go from the place where he remained, from the time that the conversation on the subject of an arrangement commenced, until the final departure of the defendant; and moreover, that they were armed with authority so to do. Formerly, it was necessary, that there should be some actual corporeal touching, in order to constitute an arrest. But, there may be an arrest now without any such touching. No doubt, if the warrant had been shewn, and then what subsequently took place had happened, a sufficient arrest would have been effected. It does not, however, appear here that it ever was shewn. All that I can see is, that the officer had a warrant, which he never shewed, and that he never informed the defendant that he had a warrant; and the defendant never knew that he had it. It is true, that the parties remained closely watching him in order to prevent his leaving *Callington*, but it does not appear that such a use was made of the warrant as to constitute an arrest. Under these circumstances, I think the present rule must be discharged, but without costs.

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Rule discharged, without costs.

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REX v. FENY.

It is not indispensably necessary, that when a witness is called on his subpoena the officer of the Court should hold the writ in his hand; it is sufficient that the writ should be exhibited in Court, and the officer call him three times.

A witness is bound to attend in Court himself, pursuant to his subpoena; and it is no excuse for not attending that the person whom he employed as his agent to watch the proceedings of the Court neglected to give him notice in due time.

HUMFREY shewed cause against a rule obtained by **Moody**, for an attachment against a witness for not obeying a Crown Office *subpœna*. The facts were these:—When the trial was called on, and before the jury was sworn, the witness was called. The attorney for the plaintiff held in his hand the *subpœna*. The witness was then called in the Court, outside the Court, and, lastly, three times in the Court by the crier, pursuant to the Judge's direction for that purpose; the *subpœna* still remaining in the hands of the attorney. He would not contend that it was material who held the *subpœna* at the time the witness was called, if he was called sufficiently often; but he contended, that it ought to appear from the affidavit that the witness was not in Court, although he did not answer to the calling on the *subpœna*. But, supposing the affidavits in support of the application to be sufficient to require an answer from the defendant, the affidavit made by him would be perfectly exculpatory. The statement contained in it was, that on the day when the trial was to come on, the cause stood second in the list; and finding, therefore, that it could not come on at half past nine, the hour mentioned in the *subpœna*, he left a person in Court to watch the progress of the preceding cause, with directions to him to come for the witness as soon as there should be a probability of his being wanted. Unfortunately, the cause came on earlier than was expected; and therefore, when called, he was not in Court, although he came in immediately afterwards. This statement of facts, he contended, was sufficient to exculpate the witness for his non-attendance when called on his *subpœna*.

Moody, in support of the rule, contended, that no ex-

cuse at all was furnished by the defendant's affidavit for not obeying the *subpœna*. When a party was served with a *subpœna*, he was bound to lay aside all other business in order to obey it, and he had no right to leave another person as his deputy to watch the proceedings of the Court, while he himself pursued his own private avocations; but he ought himself to attend in Court pursuant to the requisition of the *subpœna*. He cited *Dixon v. Lee (a)*, where the Court of *Exchequer* held, that upon a motion for an attachment against a witness for disobedience to a *subpœna*, in not attending at the trial, an affidavit that she was called three times in Court is sufficient, without alleging, that she was called upon the *subpœna*. This clearly shewed, that the calling on the *subpœna* itself was not necessary in order to bring the party into contempt. In fact, after the party had been served with a *subpœna*, it was his duty to attend pursuant to it, and if he did not, he was guilty of a contempt of the Court. The contempt did not proceed upon any supposed injury done to the person who subpœnaed him, but on the disrespect he shewed to the Court, in not obeying its process. In the case of *Barrow v. Humphreys (b)*, where a similar application to the present was made, the language of Mr. Justice *Best* was very important. His words were, "An attachment for contempt proceeds, not upon the ground of any damage sustained by an individual, but it is instituted to vindicate the dignity of the Court. Wherever it is distinctly shewn, that the party meant to disobey the order of the Court, he is guilty of a contempt. The calling of the witness upon the *subpœna* is only for the purpose of obtaining clear evidence of his having neglected to appear. But that is not necessary if it can be clearly shewn, by other means, that the party has disobeyed the

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(a) Ante, p. 259.

(b) 3 B. & Ald. 598.

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order of the Court." In the present case, it was quite clear on all hands, that the party had disobeyed the *subpœna*. He was therefore guilty of a contempt, unless a sufficient excuse was given for not obeying the order of the Court. No such excuse had been given, and therefore the attachment must go.

WILLIAMS, J.—It appears to me that it would be very dangerous, if a witness were allowed to rely upon the opinion that the state of the business was such, that he would not be wanted until a particular time, and consequently not to make his appearance until then; and when he found that his calculations were wrong, to excuse himself by stating those calculations. I am not aware that any such dispensation of close personal attendance in Court pursuant to the *subpœna* has ever been made. As to the circumstances of the *subpœna* not being in the hands of the officer of the Court at the time the witness was called, it appears to me that that was immaterial, as there was a *subpœna* actually produced and exhibited in Court, and the presiding Judge himself directed the officer to call the witness to appear pursuant to his *subpœna*. Then comes the question, whether, upon this occasion, the witness had a sufficient reason for not attending. It has been said, that this cause did not stand first. That is no excuse. He was required to attend in Court at half past nine. His not appearing there at that time must be at his own risk. But then, it is said, that he had provided some one to remain in Court in order to watch the cause, and to come for him in case of his being wanted. But, it seems to me, that a witness has no right to attend thus by proxy, and instead of obeying the command of the *subpœna* remain attending to his own private business or pleasure. Therefore, although the chances were that this event of the cause coming on would not occur, yet as it has

occurred, the *subpœna* has not been obeyed, and no sufficient answer has been given for such disobedience. The present rule for the attachment must, therefore, be made absolute.

Rule absolute.

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HIGGINS v. HOUSEMAN.

ARMSTRONG shewed cause against a rule *nisi* obtained by *Wightman*, for changing the venue in this cause from *London* to *Lancashire*. The defendant had pleaded, and therefore the application was founded on special circumstances set forth by the defendant in his affidavit. The mere statement contained in it was that all his witnesses were resident in the county of *Lancashire*. In answer to this, the plaintiff swore that all his witnesses were resident out of the county of *Lancashire*, and two of them near *London*. Under these circumstances, he contended that the venue ought to remain in *London*. The plaintiff, who had the right of choosing the venue in a transitory action, stated that two of his witnesses resided near *London*, while the defendant, who sought to change the venue, only alleged in general terms that his witnesses resided in *Lancashire*. It did not appear from this that it was intended by the defendant even to call any witnesses.

If a defendant applies to change the venue after plea, the *onus* of showing special grounds for the change lies on him.

Wightman, *contra*, submitted that the affidavit produced by the plaintiff was not sufficient to prevent the defendant's application from succeeding. The defendant swore that all his witnesses resided in *Lancashire*, while the plaintiff only swore that two of his witnesses resided near *London*.

WILLIAMS, J.—The present application having been made after plea pleaded, it can only succeed on special

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grounds. The question then is, whether sufficient special grounds have been laid before me to authorize that change. Affidavits have been produced on both sides, and neither of them have been very satisfactory. If there be generality in the expressions used by the plaintiff, there is also generality in the expressions used by the defendant. But the defendant ought to make out a satisfactory ground to the Court on which it may act. Now the statement made by the plaintiff that two of his witnesses are resident near *London* is quite as particular as that made by the defendant of all his witnesses being resident in *Lancashire*. The defendant then not having laid any special ground on which the Court can act, his application fails. The present rule therefore must be discharged; and with costs, because it was the defendant's duty to have made out his special grounds before he obtained the present rule.

Rule discharged, with costs.

JOHNSON v. WARDLE.

In an action commenced by bailable process, the Court will not stay proceedings until after the trial of an indictment for perjury founded on the plaintiff's affidavit of debt.

HOGGINS shewed cause against a rule *nisi* obtained by *John Jervis* for staying proceedings in the present action, which had been commenced by bailable process, until after the trial of an indictment for perjury preferred against the plaintiff on his affidavit of debt. He objected to such an application as the present, as being quite contrary to the practice of the Court; and he cited *Rex v. Boston (a)*, which shewed that in a civil proceeding the Court would take no notice of a criminal one, which might be going on against one of the parties in the cause, so far as to stay the proceedings.

John Jervis supported the rule.

(a) 4 East, 572.

WILLIAMS, J.—I cannot take into consideration the indictment for perjury at all. If I were to do so, it would be an encouragement to experiments of this sort, that, whenever a party found himself close pressed with such an action, the course would be to indict the plaintiff for perjury, and then stay his proceedings by an application of this sort, until after the trial of such indictment, which trial might be deferred for an indefinite period. The present rule must therefore be discharged, with costs.

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Rule discharged, with costs.

— *But see Granger v. Maddams. 6 St. 2*

ROBERTS v. SPURR.

BYLES shewed cause against a rule obtained by *Mansel*, requiring the plaintiff to shew cause why the declaration in this case should not be set aside, and the interlocutory judgment arrested. The objection to the proceedings was, that there was no appearance entered either by the plaintiff or the defendant previous to the declaration and judgment. The facts of the case were these:—The writ of summons issued against the defendant on the 18th *March*, and was duly served. A declaration was afterwards delivered on the 6th *April*, at the office of the defendant, who was an attorney. No appearance to the process had been entered by the defendant, or by the plaintiff for him. The defendant, however, accepted the declaration, and never returned it. Interlocutory judgment was subsequently signed for want of a plea; and then, on the 5th *May*, the present rule was obtained. The defect in question, which must be regarded as a mere irregularity, was in existence, and within the knowledge of the defendant, on the 6th *April*. The motion on the ground of this irregularity not being made until the 5th

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May, a month had elapsed without the defendant availing himself of it. The defendant, therefore, was too late in coming to the Court. By 1 *Reg. Gen. H. T. 2 Will. 4, s. 33 (a)*, it was ordered, that "no application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time; nor, if the party applying has taken a fresh step, after knowledge of the irregularity." Here, it could not be said that the defendant had come within a reasonable time, and, therefore, his application must fail; and, secondly, the acceptance of the declaration without objection constituted a step in the cause. Either way, therefore, the defendant could not sustain the present rule. He cited also *Morgan v. Bayliss and Wife (b)*, where the marginal note was, "*Semble*, that where costs have been incurred by the delay of the defendant in objecting to a defect in the affidavit of debt, the Court will not order the bail bond to be delivered up to be cancelled, although the defect be in some degree one in substance and not in form." Here, costs had been incurred by the delay of the defendant in applying to the Court, in the same manner as in the case cited; and, as it was the disposition of the Court there, not to cancel the bail-bond for such a reason, a similar course ought to be pursued with respect to the declaration and judgment in the present case. In that case also it was to be observed, that the objection was not merely formal. But, independent of the delay, no difficulty arose on account of an appearance not having been entered, because a party might, by consent, waive a declaration, without any appearance having been entered. Here, the party, by accepting and keeping the declaration, must be taken to have waived the necessity of an appearance. The present rule ought, therefore, to be discharged.

(a) Ante, Vol. 1, p. 187.

(b) Ante, p. 117.

Mansel, in support of the rule, contended that a judgment had here been signed against a person who was not before the Court, and which was consequently a nullity. The Uniformity of Process Act gave three forms of entering an appearance for a defendant, one of which must be adopted. Unless one of them was adopted, the defendant was not before the Court, and consequently no available judgment could be signed under such circumstances. If the defendant did not, after service of the writ, enter an appearance for himself, the plaintiff might enter one for him, in pursuance of the proviso contained in the writ itself. Unless, however, one or other of the parties entered an appearance, and thus brought the defendant before the Court, a judgment signed against him must be a nullity. As to the objection, that the defendant had waived the defect, no waiver, under such circumstances, could take place. An irregularity might be waived, but a nullity could not.

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WILLIAMS, J.—The objection to the present proceedings is, that they are a nullity. There being no person before the Court against whom a judgment can be signed, the present judgment must be a nullity. The plaintiff has brought this result upon himself, because he might, under the circumstances, have entered an appearance for the defendant. The question then is, whether, by the defendant's delay, the objection to the proceedings is removed? In the case of *Garratt v. Hooper* (a), the case was this: the defendant had pleaded in abatement, without an affidavit of the truth of his plea, which, by the provisions of the statute of *Anne*, was rendered indispensably necessary; the plea was, therefore, a nullity; but it was said that it had been waived: there, Mr. Justice *Taunton* said, "There is this difference between an irregularity and a

(a) Ante, Vol. I, p. 28.

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nullity: an irregularity may be waived, but a nullity cannot. It is not in the power of the party to waive it; as the act of Parliament declares it to be a nullity, the Court is so to judge of it." As I must consider the proceedings here a mere nullity, and as, according to the authority of the case I have just cited, a nullity cannot be waived, I am of opinion that the present rule must be made absolute, though without costs.

Rule absolute, without costs.

RAGGETT v. GUY.

An affidavit of debt, defective as to part, is defective as to the whole.

HOGGINS shewed cause against a rule obtained by *Turner*, for setting aside the bail-bond given in this case, on the ground of a defect in the affidavit of debt. The affidavit was for 100*l.*, alleged to be due on a bill of exchange, and also for a certain other sum of 100*l.*, for money lent and advanced. The amount of the bill of exchange was not stated, and consequently the affidavit was bad as to it. The only question then was, whether, being bad as to part, it was bad as to the whole. He contended, that, although it was bad as to part, it was not bad as to the whole. It was true that the Court of *Exchequer*, in the case of *Baker v. Wells* (a), had decided, that, where an affidavit to hold to bail embraces several causes of action, and one of them is defectively stated, it vitiates the whole affidavit, and the defendant is entitled to be discharged *in toto* on entering a common appearance. The authority of that case, however, had been doubted by the profession, and had also been doubted by Mr. Justice *Littledale* at chambers, when the present case was before him. There did not seem to be

(a) Ante, Vol. 1, p. 631.

any good reason why, if there were two independent claims made in an affidavit of debt, and the mode of stating one was incorrect, the whole should be vitiated, however correctly the other might be stated. In that case, Lord *Lyndhurst*, who decided it, formed his opinion rather upon the absence of authority against his opinion, than from the existence of any in support of it. His Lordship said, "As no case has been cited in which, where the affidavit was defective as to part, it has been held good for the other part, the rule must be made absolute." The fact of no case being then brought before the Court might arise from the want of time of the counsel who argued it to look into the authorities, or from some other cause; and, therefore, the mere absence of any case to such an effect was not a sufficient foundation for the opinion entertained by the Court.

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Turner, in support of the rule, contended, that, both on the cases and principle, this rule ought to be made absolute. The case of *Baker v. Wells* did not stand by itself; for a similar opinion was expressed by the same Court, in a case of *Kirk v. Almond* (a). There, the defendant had been arrested on an affidavit, which stated that he was indebted to the plaintiff on three promissory notes for certain sums. No statement was made in the affidavit as to when the two last notes were payable, or that they were over due and unpaid. There, the Court said, "The defendant is in substance alleged to be indebted by virtue of three several instruments. The presumption is, that the defendant was arrested for the sum sworn to, and that he is now in custody for that amount. For part of that amount, the affidavit shews no right to arrest; and as we are aware of no instance in which an affidavit of debt, bad in part and good in part, has been upheld as to the good

(a) Ante, Vol. 1, p. 318.

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part, the defendant must be discharged on filing common bail." That case was precisely similar to the present, and the decision of the Court was to the same extent, and viewed the case in the same way. Then, as to the principle: the right to arrest was *strictissimi juris*, and therefore ought to be strictly pursued. If a party chose to arrest another for a particular sum, the affidavit ought to shew a legal cause of action strictly stated, to the extent for which the arrest was effected. If the claim were all one sum, it was quite clear that a defect in the statement of it would be sufficient to entitle the defendant either to his discharge, or to have the bail-bond cancelled. What difference could there be then in point of principle, when the demand consisted of several sums? The power of joining different claims, in order to arrest for the total, was for the benefit of the plaintiff, and a defendant ought not thereby to be placed in a worse situation than if the demand consisted of but one sum.

WILLIAMS, J.—There is no doubt that the Courts have always required that affidavits to hold to bail should be clear. The affidavit in the case before me is objectionable as to part. Then, as to the remainder of the claim, it goes on to state that the defendant is "indebted in the further sum of 100*l.*, for money lent." The question now is, whether the defendant can be held to bail for the latter sum, which is embraced in the affidavit, the former being defective. In the cases cited, the point was brought before the Court of *Exchequer*, and it was of opinion that such an affidavit was defective. I feel myself bound by those authorities, and, therefore, the present rule must be made absolute, without costs.

Rule absolute, without costs.

1835.

Re TURNER.

THEOBALD moved, on the last day of term, for a rule to shew cause why an attorney should not answer the matters in an affidavit on which he moved, and which imputed certain misconduct to that attorney.

A motion to compel an attorney to answer the matters in an affidavit cannot be made on the last day of term.

WILLIAMS, J. (after consulting with the clerk of the rules).—This being the last day of term, it is contrary to the established practice of the Court to grant such a motion as this, which is now sought to be made against an attorney.

Rule refused.

DOE *d.* LAMBERT *v.* ROE.

WIGHTMAN shewed cause against a rule obtained by *Theobald*, calling on the lessor of the plaintiff to shew cause why the writ of *habere facias possessionem* executed in this case should not be set aside, on payment of the rent in arrear, and of the costs of the action in ejectment, pursuant to the judgment on which the writ of possession had issued. The present application was quite without precedent, for never had the Court so far interfered as to set aside proceedings on payment of costs, after the writ of execution had been carried into effect. The affidavits, however, in answer to the rule, shewed, that the landlord had brought the action of ejectment, not merely on account of nonpayment of rent, but for not repairing, for not building (the original lease being a building lease), and also for not insuring the premises, of which the applicant was the sub-lessee. The landlord was now in actual possession of the premises, and had laid out money on them in making

After execution executed in an action of ejectment, the Court will not set the proceedings aside on payment of the rent due and costs of the action, if there are other grounds of forfeiture besides the nonpayment of rent; and if such an application be made, the Court will dismiss it with costs.

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those repairs, the non-making of which had worked the forfeiture on which the action of ejectment had proceeded.

Theobald admitted, that, under the circumstances stated in the affidavits of the other side, he could not sustain his rule, though he should contend that his rule must have been made absolute had the case stood merely on his own affidavit; and as to the question of the costs of the application, he submitted that the rule ought to be discharged without costs, as the applicant had come to the Court in consequence of the information he had received from the attorney of the lessor of the plaintiff, that the sole ground of forfeiture was the nonpayment of rent.

WILLIAMS, J.—It is consistent with your affidavit that he might have told you of the other grounds of forfeiture.

Wightman, *contrà*, (as to the costs), contended, that the lessor of the plaintiff was quite innocent, and ought not to have been brought to the Court to answer such a speculative application.

WILLIAMS, J.—I think the rule must be discharged with costs. If the rule has been moved either from a want of proper care in obtaining correct information, or from having received incorrect information, that is the misfortune of the applicant; but the superior landlord is not, on that account, to be brought before the Court by that which is only an experiment. The present rule must, therefore, be discharged with costs.

Rule discharged, with costs.

1835.

GURNEY v. KEY.

KELLY shewed cause against a rule obtained by *Platt*, requiring the plaintiff to shew cause why he should not give security for costs, on the ground of his being abroad at *Neuville*, on the *Rhine*. It appeared from the affidavit on which the application was founded, that the plaintiff was in this country when the action commenced, on the 19th *January*. An order for time to plead was taken out on the 12th *February* by the defendant. On the 23rd *April* the present rule was obtained. Under these circumstances he contended, that supposing the plaintiff to be actually domiciled abroad, and permanently resident there, the defendant had waived his right to security for costs, by obtaining an order for time to plead. He cited *Duncan v. Stint (a)*, where the Court said, "That when a cause is pending, a party, if he means to apply for security for costs, must take no step after he knows the plaintiff is out of *England*, for a defendant ought not to wait until expense has been necessarily incurred; which must frequently be the case, particularly in actions of trespass and replevin." In that case the defendant had pleaded, and the Court refused to compel the plaintiff to give security for costs, unless he could make an affidavit, that at the time he pleaded he was not acquainted with the plaintiff's absence from this country. Obtaining time to plead was just as much taking a step in the cause as pleading. It was, therefore, necessary that the defendant's affidavit should shew, at the time of the application being made, that the fact of the defendant's absence from this country, when he took the step, was unknown to him. He cited *Rex v. Day (b)*, the marginal note of which case was, "In *quo warranto* informations the Court will not force an in-

If a plaintiff be permanently resident abroad, and is only occasionally in this country, he will be liable to give security for costs.

Obtaining an order for time to plead does not preclude a defendant from obtaining security for costs.

(a) 5 B. & Ald. 702; 1 Dowl. & Ryl. 349. (b) Ante, Vol. 1, p. 32.

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digent relator to give security for costs, when it does not appear that the fact of indigence had not come to the defendant's knowledge before issue joined (a)." In that case the same principle was recognised. But the affidavits in answer to those of the defendant shewed, that the plaintiff was temporarily resident abroad, for the sake of his children's education. He was in this country, and had a residence in *St. James's Square*, when the action was commenced; he was also in this country on the 30th of *April*, as appeared by the date of his affidavit, and therein he described himself as of *Trevilian House, Tregony*, in the county of *Cornwall*. These facts shewed, that he was resident in this country, although he might be frequently abroad. According to an *Anonymous* case in 8 *Taunt*, "Security for costs is not required from a person while in this country although usually residing abroad (b)." He therefore contended, that the plaintiff was not bound to give security for costs.

Platt, in support of the rule, contended, that if the plaintiff sought to free himself from his liability to find security for costs, he ought to shew by his affidavit that his residence was in this country. No statement of his residence was made in his affidavit, and therefore it was fairly to be presumed that he really was not resident in this country, but that his permanent residence was at *Neuville* on the *Rhine*. If such were not the case, there could be no doubt that the plaintiff would have stated where his residence was in this country. It appears, too, that only a short time since he came to this country as a

(a) See *Brown v. Wright*, ante, Vol. 1, p. 95, and 1 Reg. Gen. H. T. 2 W. 4, s. 98, ante, Vol. 1, p. 196.

(b) See *O'Lawler v. Macdonald*, 8 *Taunt*. 736, where it was held

that a British officer serving abroad under a foreign power is not compellable to give security for costs. See also *Lord Nugent v. Harcourt*, ante, Vol. 2, p. 578.

witness on a reference ; and while here, being arrested for debt, he applied for his discharge out of custody, on the ground of his privilege from arrest while attending as a witness ; and then in his affidavit in support of the application, he stated himself to be resident abroad. That was mentioned at the time in his affidavit as an additional reason for believing, that he was merely attending as a witness in this country. With respect to the objection, that the defendant had waived his right by obtaining an order for time to plead, that could not be sustained ; because in the case of *Wilson v. Minchin* (a), the Court of *Exchequer* held, that security for costs may be applied for after an order for time to plead, and observed, that “ a defendant may come to ask for security for costs at any time before plea pleaded.” Under these circumstances he submitted, that the present rule must be made absolute.

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WILLIAMS, J.—Upon the whole of these affidavits I can have no doubt that the residence of this gentleman is now abroad. He does not state himself in his affidavit to be resident in this country, but merely describes himself as of *Trevilian House* in the county of *Cornwall*. On the occasion of applying to be discharged out of custody on his arrest, it appears that he stated himself to be resident abroad ; and in the present case, if he had a domicile here, I must presume that he would have stated it. I must, therefore, take it as a fact, that he has not a domicile here, but that he has only been in this country for certain temporary purposes, there being nothing to shew that his absence abroad is merely temporary. I therefore think that on that ground he ought to find security for costs. With respect to the delay in the application, I think, on the authority of *Wilson v. Minchin*, it was made sufficiently early. As, therefore, it appears to me, that the

(a) Ante, Vol. 1, p. 299.

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plaintiff is completely domiciled abroad, and has only come here for temporary purposes, the present rule must be made absolute.

Rule absolute.

Ex parte CHAPMAN.

If the original indenture of clerkship is lost, a copy may be enrolled.

C. CRESSWELL moved for leave to enrol a copy of the indenture of clerkship in this case, under these circumstances. The clerk in question had been regularly bound, and the original indenture sent to the agent's office in town for the purpose of being enrolled. A clerk of the agent was then employed to get the indenture enrolled, and he had made a charge as for money paid for so doing. It appeared, however, on inquiry, that he had not done so. He had since then absconded, and the indenture could not be found, although a strict search had been made in every place, wherein it was at all probable that it had been deposited. The probability was, that the clerk had applied the money received by him as the fee for enrolling to his own purposes, and then the more securely to prevent detection he had destroyed it. The application, therefore, was, that a copy of it might be enrolled instead of the original.

WILLIAMS, J.—Under these circumstances, I think you may enrol a copy instead of the original indenture.

Rule accordingly.

1835.

DOE *d.* FROST *v.* ROE.

BALL moved for leave to sign judgment against the casual ejector. The only peculiarity in the case was, that the notice at the foot of the declaration was directed to a person named "*John Crisp*," and the name of the tenant in possession was "*Thomas Crisp*." The person effecting the service, however, informed the tenant that he was the person meant by the notice. All the other requisites of a complete service were fulfilled.

Special service
in ejectment.

WILLIAMS, J.—I think that will be sufficient. You may take your rule.

Rule granted.

ALBIN *v.* TOOMER.

MANSEL moved for an attachment against an attorney for nonpayment of costs pursuant to the Master's *allocatur*. The difficulty in the case was, that no personal service of the rule had been effected. He was aware, that the cases of *Green v. Prosser* (a), and *Allier v. Newton* (b), where, under special circumstances, personal service had been dispensed with, were now over-ruled by *Stunell v. Tower* (c). It was decided in that case, that an attachment could only be granted on personal service of the rule. The defendant there was not an attorney, and therefore service which might be insufficient in the case of any other defendant might be quite ample in that of an attorney. He then read an affidavit, from which it appeared, that several and continued efforts had been made to serve the defendant, but without success. Under

Personal service
of the rule for
payment of
costs is neces-
sary in order to
obtain an at-
tachment, al-
though the de-
fendant is an
attorney.

(a) Ante, Vol. 2, p. 99. (b) Id. p. 582. (c) Id. p. 673.

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TOOMER.

these circumstances, he hoped that the Court would think it right to grant an attachment.

WILLIAMS, J.—It appears to me that every possible effort has here been made to serve the defendant; but after the judgment pronounced by the Court of *Exchequer*, in *Stunell v. Tower*, I think I cannot allow an attachment to go, without personal service of the rule being effected. There, Lord *Lyndhurst* said, “It is much better in cases of this kind to adhere to the general rule, that personal service should be required. The Court is more anxious to lay down this rule, as the case cited might be supposed to authorize a less strict practice.” There, the question came directly under the consideration of the Court. Nothing could be more general than the language of the Lord Chief Baron; and I see no reason for making any exception, merely because the defendant is an attorney. The attachment cannot be allowed to go.

Humfrey, amicus curiæ, mentioned a case, which had occurred in the *Common Pleas* lately, and in which that Court held, that the fact of the defendant being an attorney made no difference, and that the rule as to personal service must be equally pursued in such a case.

Rule refused.

WILKINSON v. SMALL.

It is no objection to pleas that they are inconsistent.

CURWOOD applied for a rule to shew cause, why the plaintiff should not be at liberty to strike out certain pleas pleaded by the defendant, on the ground, that they were inconsistent with each other.

WILLIAMS, J.—The fact of inconsistency in the pleas

with each other is no objection to them. A defendant may have several defences to an action, each good in itself, but inconsistent with each other. It would be very hard upon him, if he were not permitted to plead them all. The rule is much more strict as to plaintiffs, who are only allowed one count to each cause of action. The reason, however, there, is different. You will consequently take nothing by your motion.

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SMALL.

Rule refused (a).

(a) See *Duer v. Triebuer*, ante, p. 133, where the Court of Common Pleas held, that inconsistent pleas may be pleaded under the new rules, if intended *bonâ fide* to support different substantial grounds of defence.

RUST v. CHINE.

STEER shewed cause against a rule *nisi* obtained by *Mansel*, for discharging the defendant out of custody, on the ground of a defective statement of the attorney's residence, in the indorsement on the writ of *capias*. The indorsement of the residence was only "*Southampton Buildings*." That being a well-known residence of attorneys, it must be considered as a sufficient description of the attorney's address. He cited *Engleheart v. Eyre* (a), and *King v. Monkhouse* (b), where "*Gray's Inn Square, London*," was held to be a sufficient description of an attorney's residence, although *Gray's Inn Square* was not in *London*. But, if the objection were available, too great a length of time had elapsed since the arrest to induce the Court to give it effect. He cited *Fynn v. Kemp* (c), where a motion

"*Southampton Buildings*" is an insufficient description of an attorney's residence, in the indorsement on a writ of *capias*; but a lapse of more than two months from the time of the arrest is too great to enable a defendant to avail himself of the objection.

(a) Ante, Vol. 2, p. 145. (b) Ante, Vol. 2, p. 221.

(c) Ante, Vol. 2, p. 620.

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 {
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 v.
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to set aside proceedings for irregularity was held too late after a lapse of seven days. In the present case, the arrest was on the 29th *January*, and the application was not made until the 24th *April*.

Mansel was heard in support of the rule.

WILLIAMS, J.—It appears to me, that the description which the attorney has here given of his address is not sufficient. It is possible that persons in the law may know where *Southampton Buildings* are; but that would not probably be the case with those who are out of the profession. As the objection, however, only amounts to an irregularity, if the defendant wished to avail himself of it, he should have come to the Court promptly. Above two months is certainly too great a length of time to be allowed to elapse from the arrest to the time of applying to the Court. According to the case which has been cited, it does not appear to me that he has come to the Court sufficiently soon, and therefore the present rule must be discharged.

Rule discharged.

REX v. KOOPS.

In order to obtain an attachment for non-payment of costs, pursuant to the Master's *allocatur*, it is not indispensably necessary that a copy of the rule and *allocatur* should be left on the person of the defendant.

HUMFREY moved for an attachment for nonpayment of costs, pursuant to the Master's *allocatur*. The facts disclosed in the affidavit on which he founded his application were these:—The person endeavouring to serve the defendant had gone to his house, and knocked at the door. The defendant accordingly came to it. The deponent then shewed him the original rule and *allocatur* indorsed, and demanded the amount of costs claimed on the *allocatur*. The defendant then shut the door in depo-

nent's face, declaring that he would not be served. Deponent then pushed a copy of the rule and *allocatur* under the door and came away. These facts would, it was hoped, dispense with actually leaving the copy of the rule and *allocatur* in the hands of the defendant.

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 }
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 v.
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WILLIAMS, J.—I think, under these circumstances, you may have an attachment.

Rule granted.

RIDGWAY v. FISHER.

THIS was a sheriff's interpleader rule. It appeared from the affidavits produced on shewing cause, and that of the sheriff, that the following were the facts:—A *fi. fa.* had been issued to the sheriff, under which a seizure had taken place in the month of *November*. What was called a walking possession of the goods was then kept for two months; the meaning of which was, that no officer remained in the house, but one called every day to see that the goods were still safe on the premises. On the 21st *January*, absolute possession was taken of the goods. Formal notice of a fiat of bankruptcy having issued, was served on the sheriff on the 23rd. On the 26th, notice was given to him, that the goods were the property of a mortgagee. An action was commenced by the assignees on the 25th *March*, and on the 26th the execution creditor ruled the sheriff to return the writ. The sheriff applied to the Court for his rule in *Easter Term*.

If a sheriff receives notice on the 23rd of *January*, of a claim to goods seized by him under a *fi. fa.*, he will not be entitled to relief under the Interpleader Act, unless he comes to the Court in *Hilary term*.

Hoggins on behalf of the execution creditor, *E. V. Williams* for the assignees, and *Manning*, for the mortgagees, contended, that the application of the sheriff was too late, and that the Court could

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not grant him relief. The case of *Devereux v. John and another* (a) was cited, where it was decided, that a sheriff will not be entitled to relief under the Interpleader Act, unless he come in the first instance, on receiving notice of an adverse claim. The case of *Cook v. Allan* (b) was also mentioned. In that case, goods were taken in execution by the sheriffs and a claim made on them; but the sheriff was prevented from applying immediately, by a rule which was obtained by the defendant in the action, for the purpose of setting aside the proceedings for irregularity, and that rule was not disposed of until the 23rd *January*, when it was discharged. The application was then made by the sheriff on the 31st. The Court there held that the application was too late.

W. Alexander, on behalf of the sheriff, contended that he could not reasonably have been expected to come to the Court in *Hilary* Term, as he had no formal notice of any claim until the 23rd *January*.

WILLIAMS, J.—I think I am bound by the case of *Cook v. Allen*. The present rule must therefore be discharged, the sheriff paying the costs of all parties.

Rule discharged accordingly (c).

(a) *Ante*, Vol. 1, p. 543.

(b) *Ante*, Vol. 2, p. 11.

(c) See *Godson v. Sanctuary*, 4 B. & Ald. 255.

1835.

DOE *d. FRITH v. ROE.*

CLEASBY moved for judgment against the casual ejector. The affidavit on which he moved stated, that the deponent had gone to the premises in question, had entered the house, and seen the person who was tenant in possession. He had begun to read the notice at the foot of the declaration, when the tenant told him that he did not occupy that house but the one next door, and if he would go with him there, he would allow himself to be served. The deponent accordingly went to the door, when he was turned out by the tenant, and the door shut upon him. He then finished reading the notice, and afterwards put the declaration under the door, telling the tenant that he had done so. This, it was submitted, was enough to entitle the lessor of the plaintiff to judgment against the casual ejector.

If the tenant in possession by fraud prevents a complete and regular service of the declaration in ejectment, judgment may still be obtained against the casual ejector.

WILLIAMS, J.—You may take your rule for judgment.

Rule granted.

BRICKLINE and Others *v. SMALLWOOD.*

TOMLINSON shewed cause against a rule obtained by *Archbold*, for discharging the defendant out of the custody of the sheriff, on the ground of his having been arrested for a particular cause of action after a suit had been commenced by serviceable process for the same cause. The facts were these:—The plaintiff had commenced an action by serviceable process for a certain amount of rent. Before that suit was concluded, other rent accrued due, and for that rent the defendant was arrested, and he paid the debt and costs in that action. After this, without discon-

A plaintiff may, without discontinuing, arrest a defendant for a cause of action, although he has proceeded in an action commenced by serviceable process for the same cause, so far as to put it down for trial.

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v.
SMALLWOOD.

tinuing the first action, and after it had been entered for trial at the *York Assizes*, the plaintiff arrested the defendant for a portion of the rent for which the first action had been brought, as he found that the defendant had advertised his stock for sale, and soon intended to quit this country for *America*. This was, therefore, the ordinary case of arrest, without discontinuing an action commenced by serviceable process. No objection existed to that course, as it had frequently been determined that a plaintiff, after suing out serviceable process, may sue out a bailable writ for the same cause, and arrest the defendant before he discontinues his first action; for such a case is not within the rule of *M. T. 15 Car. 2, Reg. 2, K. B.* The cases were collected by Mr. *Tidd*, in his *Practice* (a), which were to that effect. A stronger case, however, than any of these had been decided lately in this Court. The case was *Chapman, Executor, &c. v. Vandevelde* (b), where the Court held, that a plaintiff may arrest a defendant after suing out three serviceable writs, without discontinuing the actions which he has so commenced. The fact of the intermediate arrest could not affect the right of the plaintiff.

Archbold, in support of the rule, submitted, that, until the plaintiff had discontinued the action commenced by serviceable process, and in which he had proceeded so far for the same cause of action, he could not arrest the defendant; more particularly as the rent for which the second arrest took place had accrued due before the rent for which the first arrest was made had become due; and, therefore, the defendant might have been arrested in one action for the whole.

WILLIAMS, J.—I think the present rule must be dis-

(a) Vol. 1, p. 174, ed. 9.

(b) Ante, p. 313.

charged. It is quite clear from the affidavits, that the rent for which the first arrest took place formed no part of the demand for which the serviceable process was sued out. That arrest, therefore, may be laid out of consideration. The facts then are, that the plaintiff has arrested the defendant without discontinuing the action commenced by serviceable process. The cases all shew that there is no objection to that course. But it is urged that a long course of time has been allowed to elapse, and the proceedings have been carried on to a considerable length before the defendant was arrested. There is no objection to the plaintiff's proceedings on that account, as he will be the only person to suffer, since he will have to pay the more costs of discontinuance. The present rule must, therefore, be discharged.

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Rule discharged, but without costs.

GRONOW v. POINTER.

R. V. RICHARDS obtained a rule *nisi* for compelling the plaintiff to give security for costs, on the ground of his being abroad. This being the last day of term, he doubted whether he could have his rule drawn up with a stay of proceedings until the next term.

A rule *nisi* for security for costs, with a stay of proceedings, will not be allowed on the last day of term.

WILLIAMS, J., (after consulting with the clerk of the rules), said, that, as the day on which the application was made was the last day of term, the rule could not be granted with a stay of proceedings.

Rule *nisi* accordingly.

1835.


ROGERS v. TWISDEL.

In order to obtain an attachment, it is not sufficient that all the necessary steps are taken, partly at one time and partly at another.

HOGGINS moved for an attachment for nonperformance of an award, and nonpayment of costs, pursuant to the Master's *allocatur*. The demand was not made by the person to whom the sum due on the award was payable; but a power of attorney was given by him to a person who now made an affidavit. On one occasion, the person so empowered went to the defendant, and served him with a copy of the award and *allocatur*, shewing him at the same time the original award and *allocatur*. He had not at that time, however, the power of attorney with him, and therefore could not shew it to the defendant. Subsequently, he went to the defendant with the power of attorney, and shewed it to him, but did not shew the other documents. The question was, whether these two imperfect services could be connected, so as to enable the plaintiff to obtain an attachment.

WILLIAMS, J.—I think enough has not been done to enable you to obtain an attachment. All the necessary materials for making the demand should be in the hands of the party at the time he makes it, or he will not be entitled to obtain an attachment against the defendant. You will therefore take no rule.

Rule refused.

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WENHAM v. DOWNES.

SIR WILLIAM FOLLETT shewed cause against a rule *nisi* obtained by *R. S. Richards*, for setting aside an attachment against the plaintiff for nonpayment of costs, pursuant to the Master's *allocatur*, on the ground that no demand on the rule and *allocatur* had been made. The affidavits on both sides in substance disclosed these facts. The plaintiff had been present at the taxation of the costs, and a copy of the rule with the *allocatur* indorsed thereon was sent to his residence. Subsequently, when an attempt was made to serve him, the original rule, with the *allocatur* indorsed thereon, was shewn to him; but, before any demand could be made of the amount of costs, he knocked down the person endeavouring to serve him. A violent contest then ensued, and the deponent was obliged to make his escape, to save himself from further personal violence. Under these circumstances, *Sir William Follett* contended, that the necessity of making a demand of the amount of costs was waived by the conduct of the plaintiff himself. True it was, that in general a demand was necessary, but that only applied to cases where the person serving the rule and *allocatur* might, if he chose to use proper means, have made a demand.

In order to obtain an attachment for nonpayment of costs, pursuant to the Master's *allocatur*, a demand is not necessary, if the party sought to be served by his violence prevents the service from being made.

R. S. Richards, in support of the rule, contended, that the Courts had always held parties strictly to the practice of making a demand for the costs alleged to be due, before an attachment could be allowed to issue. Here it was acknowledged, that no such demand had been made, and therefore the attachment ought not to have gone. The fact of the plaintiff's violence was not sufficient to remove the necessity of making such demand; because a subsequent attempt might have been made, when *non con-*

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stat, that there would have been any violence on the part of the plaintiff sufficient to prevent such demand. The present rule ought therefore to be made absolute.

WILLIAMS, J.—No doubt, the general rule is, that in order to entitle a party to an attachment for nonpayment of costs, pursuant to the Master's *allocatur*, a demand of the costs must be made. But that general rule can only be applied to cases where the party sought to be served remains in such a position as will enable the person seeking to serve to make a demand; and not to one in which the party sought to be served resorts to such violence as to render a contest of main force necessary, which shall endure until the person endeavouring to effect the service has overpowered the person sought to be served. The principle upon which a demand is necessary is, that the nature and extent of the claim on the *allocatur* may be clearly communicated to the party affected by it. Here, there was nothing unintelligible in the nature and extent of the claim set up by the deponent; for the plaintiff himself had attended the taxation, had received a copy of the rule and *allocatur*, and had the original and *allocatur* shewn him on the occasion in question: he must consequently have been fully aware of the nature and extent of the demand founded on the *allocatur*. The present rule must therefore be discharged with costs.

Rule discharged, with costs

1835.

DOE *d.* THOMSON *v.* ROE.

CHANNELL moved for judgment against the casual ejector. The peculiarity in the case was, that the notice at the foot of the declaration required the tenant to appear in last *Hilary* Term, and the service had been duly effected before that term. One term consequently had elapsed between the service and the motion for judgment. He cited *Doe v. Roe (a)*, and *Doe v. Roe (b)*, where similar applications had been allowed by the Court.

If a regular service is effected before the term in which the appearance is to be made elapses, a motion for judgment may be made in the following term on the same service.

WILLIAMS, J.—You may take your rule.

Rule granted (c).

(a) Ante, Vol. 1, p. 494.

in the first instance, must be

(b) Ante, Vol. 2, p. 196.

served, so as to give the tenant

(c) This rule, though absolute notice.

DOE *d.* LUFF *v.* ROE.

KELLY moved for a rule to shew cause why judgment should not be signed against the casualejector. The affidavit on which he moved stated various circumstances, shewing that the tenant was keeping out of the way to avoid being served. A copy of the declaration had been left with the son of the tenant on the premises, and the usual explanation given. This, it was conceived, was enough to entitle the lessor of the plaintiff to a rule *nisi*.

If a tenant in possession is clearly keeping out of the way to avoid being served, the Court will grant a rule *nisi* for judgment, if the son is regularly served on the premises.

WILLIAMS, J.—You may take a rule *nisi*, the service to be on the son on the premises.

Rule *nisi* granted.

1835.

DEEMER v. BROOKER.

Where a defendant has been taken in execution on a *ca. sa.*, and he afterwards removes himself into the custody of the Marshal, the plaintiff is neither obliged to carry in the roll, nor to charge him in execution.

DOWLING shewed cause against a rule obtained by *Ball*, for the purpose of discharging the defendant out of custody for irregularity. The supposed irregularity complained of was two-fold. The *first* objection was, that before the plaintiff issued execution, he had not carried in the roll; and *secondly*, that he had not been charged in execution pursuant to the rule of *Easter Term*, 41 *Geo. 3.* As to the first objection, that the roll had not been carried in, by 1 *Reg. Gen. H. T. 2 Will. 4*, s. 95, it was ordered, that "in order to charge a defendant in execution, it shall not be necessary that the proceedings be entered of record (a)." With respect to the second objection, the rule did not apply to a case like the present. The facts of it were these. At the *Summer Assizes* for *Chelmsford* in the last year, a verdict was found against the defendant in an action of trespass for an assault and battery. Judgment was signed on the 28th *November* following, and a *ca. sa.* was issued into the county of *Essex*, by virtue of which the defendant was taken on the 5th *December*. Subsequently, he removed himself by *habeas corpus* into the *Marshalsea* of the *King's Bench*. In such a case as this, there could be no charging in execution, because the defendant was already in execution at the time when he was taken to the *Marshalsea* of this Court. The rule on which this application was founded only applied to those cases where a defendant was in custody at the time when the judgment was signed. The words of it were, "that from and after the first day of *Trinity Term* next, every *committitur* on every judgment obtained or to be obtained in this Court against any prisoner or prisoners, shall be filed with the clerk of the

(a) Ante, Vol. 1, p. 196.

docquets of this Court, on or before the last day of the term in which such prisoner or prisoners is or are to be charged in execution. And the said clerk of the docquets shall enter such *committitur* on the judgment roll within four days next after the end of such term, exclusive of the last day of the term, unless the last of such four days be *Sunday*; and in that case, within five days next after the end of such term; and that in default thereof, such prisoner or prisoners shall be entitled to be discharged." The rule clearly referred only to cases in which the defendant was already in custody, at the time of proceedings being taken against him.

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Ball, contra, was heard in support of the rule.

WILLIAMS, J.—It appears to me that the rule in question only applies to cases in which persons are already in custody of the Marshal when the execution is sued out. I am of opinion, therefore, that it was unnecessary for the plaintiff to charge the defendant in execution, as he was already taken in execution on the process which had been sued out. The present rule must, therefore, be discharged with costs.

Rule discharged, with costs.

DOE *d.* MORPETH *v.* ROE.

BINGHAM applied for a rule to shew cause why judgment should not be signed against the casual ejector. The premises in question were a public-house. The tenant, who was a woman, clearly kept out of the way to avoid being served; and notwithstanding constant watchfulness and frequent calls, no personal service could be effected on her. A foreman of hers conducted the busi-

Where a tenant in possession keeps out of the way to avoid being served, a rule *nisi* for judgment may be obtained by a service on the agent of the tenant on the premises.

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ness, and when inquiries were made of him as to where his mistress was, he frequently said, that if the deponent tried, he might serve her. A copy of the declaration was left with the foreman, and the necessary explanation given. Under these circumstances, it was prayed that a rule *nisi* might be granted for judgment against the casual ejector, the service of the rule to be on the foreman who conducted the business.

WILLIAMS, J.—You may take a rule *nisi*.

Rule *nisi* granted.

GREEN v. LIGHT.

A rule for an attachment for nonpayment of costs, pursuant to the Master's *allocatur*, between attorney and client, is *nisi* in the first instance.

BUTT moved for an attachment for nonpayment of costs, pursuant to the Master's *allocatur*, on taxation between attorney and client. The question was, whether the rule was *nisi* or absolute in the first instance.

WILLIAMS, J.—As it is between attorney and client, it is *nisi* in the first instance. If it had been for nonpayment of costs between party and party, it would have been absolute in the first instance.

Rule *nisi* accordingly (a).

(a) See *Bray v. Yates*, ante, ante, Vol. 2, p. 531; and *Boomer v. Mellor*, ante, Vol. 2, p. 533.
 Vol. 1, p. 459; *Spragg v. Willis*,

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NUGEE v. M'DONELL.

WELSBY shewed cause against a rule obtained by *Mansel* for setting aside a declaration against a prisoner, on the ground of a rule to plead not having been given. The affidavit, on which he shewed cause, stated that such a rule had been given; but, whether it had or not, the objection was waived by the defendant having taken out a summons for time to plead.

Taking out a summons for time to plead is a waiver of a rule to plead.

Mansel was heard in support of the rule.

WILLIAMS, J.—In my opinion taking out the summons is a waiver of the objection, and therefore the present rule must be discharged.

Rule discharged.

PEPPER v. WHALLEY.

WIGHTMAN shewed cause against a rule obtained by *Harrison*, on behalf of the defendant, to shew cause why he should not have further time to complete the record in a cause of *Pepper v. Whalley and another*, pending in the *Common Pleas*. The facts were these:—An action was commenced in the Court of *Common Pleas* against the defendant and another person. Subsequently, the present action, which was in covenant, was brought in the *King's Bench*, and the defendant pleaded the pendency of the suit in the *Common Pleas*. The plaintiff ruled him to bring in the record, and now the present rule was obtained for further time to complete it. Independent of the objection which might be taken, that the pendency of a suit against the defendant and

If a defendant non prosses a plaintiff in a particular action, he cannot afterwards plead its pendency in answer to an action for the same cause in another Court.

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v.
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another was no answer to an action against the defendant alone, the affidavit on which cause was shewn stated, that in the action brought in the *Common Pleas*, the defendant had nonprossed the plaintiff; consequently, there really was no action pending in that Court.

Harrison, in support of the rule.

WILLIAMS, J.—As the case in the *Common Pleas* is no longer pending, the present was an improper application, and therefore the rule must be discharged, with costs.

Rule discharged, with costs.

Harrison afterwards obtained a rule *nisi* in the full Court for rescinding the rule pronounced by Mr. Justice *Williams*, on the ground that, though the defendant in this action had nonprossed the plaintiff in the *Common Pleas*, he had subsequently abandoned his judgment.

Cause being shewn against this rule—

The Court discharged it, on the ground, that it did not appear when the defendant had abandoned his judgment of *non pros* in the *Common Pleas*. It might perhaps have been abandoned merely for the purpose of the plea in the *King's Bench*.

Rule discharged, with costs.

1835.

EVANS *v.* FRY.

ESPINASSE moved for a *distringas* against the defendant, the attempts to serve him with the writ of summons having been ineffectual. The affidavit on which he moved stated, that efforts had been made to find him at his house in *London*, and it there was ascertained that he was now with his regiment in *Louth*, in the province of *Leinster*, in *Ireland*. His affidavit, however, did not allege that the defendant had gone out of the country for the purpose of avoiding his creditors, or that there was any reason for supposing that he would not in due time return to this country.

A *distringas* will not be granted on an affidavit merely stating the defendant to be absent in *Ireland*, without shewing that he has gone there to avoid his creditors, although he may have a residence in town, at which unsuccessful attempts to serve him have been made.

WILLIAMS, J.—The statements in that affidavit are not sufficient to entitle you to a writ of *distringas*. In the case of *Moore v. Thynne* (a), the Court of *Exchequer* granted a *distringas* against the defendant, as it appeared that he had gone abroad to avoid his creditors. But no such allegation is contained in your affidavit, and therefore I cannot proceed *per saltum* to grant you this writ.

Wightman, *amicus curiæ*, stated, that he had made a similar motion on an affidavit in the same terms, before Mr. Justice *Littledale*, in last *Michaelmas* Term, but his Lordship referred the application to the full Court. There, it was renewed, and the Chief Justice, with the other Judges, was of opinion that the motion could not be granted.

Rule refused.

(a) Ante, p. 153.

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Special service
of declaration
in ejectment.

DOE *d.* WILLS *v.* ROE.

PRAED moved for judgment against the casual ejector on an affidavit which stated the following service: The deponent had gone to the premises, and knocked and called loudly at the door of the house, which he found shut up. Voices were heard conversing inside. Shortly afterwards the window was opened by some person, who, to the best of the deponent's belief, was the tenant in possession, and a quantity of filth thrown over him. The deponent then read very loudly the notice at the foot of the declaration, and gave the usual explanation. The deponent again called very loudly, but could get no answer. He then stuck a copy of the declaration on the door. The affidavit then went on to state that the tenant had been for some time keeping within the house in order to avoid being served.

WILLIAMS, J.—You may take a rule to shew cause, which may be served on the tenant himself personally, or by sticking it up on the outside of the door.

Rule *nisi* accordingly.

The rule was afterwards made absolute, on an affidavit of service by sticking the rule outside the house.

1835.

PHILLIPS v. HUTCHINSON.

BALL moved for an attachment against the defendant, who was an attorney, for nonpayment of costs pursuant to the Master's *allocatur*. The peculiarity in the case was, that no personal service of the rule and *allocatur* had been effected. Various attempts had been made to serve him, and a demand made of the costs in the usual form at his office of his clerk. On the same day as the demand had been made, a letter was received in the handwriting of the attorney, in which he stated, that he was purposely keeping out of the way on account of that and other matters; the letter at the same time acknowledged the receipt of the copy of the rule and *allocatur* indorsed. The affidavit then went on to state an admission by the clerk of the defendant, that he had given the copy of the rule and *allocatur* to his master. Under these circumstances, it was hoped that the Court would grant a rule *nisi*.

Where it is clear that the copy of the rule and *allocatur* have come to the hands of the defendant, an attorney, the Court will grant a rule *nisi* for an attachment, although strict personal service has not been effected.

WILLIAMS, J.—You may take a rule *nisi*, why personal service of the rule and *allocatur* indorsed should not be dispensed with, and why service on the clerk at the office should not be good service.

Rule *nisi* accordingly.

 POTTER v. MACDONEL.

DOWLING moved to set aside a writ of *capias*, and discharge the defendant out of custody, on the ground, that the debt for which the plaintiff had sued out his process was on his own shewing barred by the Statute of Limitations. According to the particulars of the plaintiff's

The fact of the Statute of Limitations having run since the debt accrued, is no ground for setting aside the plaintiff's proceedings.

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MACDONEL.

demand delivered with his declaration, the debt had accrued in the year 1822: it was, therefore, clearly barred by the statute. He cited *Kerr v. Dick* (a), wherein the Court held, that if an action be prematurely brought, before cause of action accrued, it will, on summary application, set aside the proceeding, though such objection would afford no defence on the trial. The present application was in principle the same as that which the Court had granted in the case cited. There, the cause of action had not accrued; here, it had been tolled: in either case the plaintiff had clearly no right of action, and therefore the Court ought to interfere to set aside the proceedings.

WILLIAMS, J.—The difference between the case you have quoted and the one now before the Court is this:—there, no debt ever had existed; here, a debt does exist; and if the defendant chooses, he may by plea prevent the plaintiff from recovering. But *non constat*, that the defendant will avail himself of the statute, or that there will not be evidence produced at the trial to take the case out of it. The rule sought to be obtained cannot be granted.

Rule refused.

(a) 2 Chitt. Rep. 11.

WHITE v. SOWERBY.

An affidavit of debt claiming interest is sufficient, though it neither states the amount of the principal, nor the time when it began to run.

HOGGINS shewed cause against a rule obtained by *Steer* in this case for cancelling the bail-bond, on the ground of a defect in the affidavit to hold to bail. The affidavit was in these terms:—" *William Robertson White, of Calvert's Buildings, High Street, in the borough of*

Southwark, in the county of *Surrey*, hop-factor, maketh oath and saith, that *James Sowerby* is 'justly and truly indebted to this deponent in the sum of 53*l.* 3*s.* 6*d.* as indorsee of a bill of exchange, drawn by *John Whitcomb* upon and accepted by the said *James Sowerby*, for the payment of 49*l.* 17*s.* 6*d.*, to the order of the said *John Whitcomb*, at a day now past, and by him the said *John Whitcomb* indorsed to this deponent, and which said bill of exchange remains now wholly due and unpaid, and for interest to the amount of 3*l.* 6*s.* upon and for the forbearance to the said *James Sowerby* by this deponent, at the said *James Sowerby's* request, of monies due and owing from the said *James Sowerby* to this deponent." The objection to the affidavit was, that it was not sufficiently certain as to the amount of the plaintiff's claim to interest. Nothing, however, could be more distinct than the mode in which the plaintiff had here stated his claim. If a defendant chose to agree to pay interest for the forbearance of money, there was no objection to his so doing. When that interest became due, it was as much a debt as any other sum of money which could be claimed from him. If that were so, an arrest might take place for it; and in order to arrest for such a debt, it was impossible to make a clearer and more accurate statement of the demand than was set forth in this affidavit of debt. The terms of it were as complete as those of a count in a declaration. The interest here claimed must of course be taken to be a legal debt for interest unpaid. This was not like the case of an arrest on a bill of exchange for its amount, and the interest accrued thereon in nature of damages; for which alone a party cannot be arrested; but supposing the bill expressly made interest payable from a time certain, the party might be held to bail for that interest, for it was a debt as much as the principal sum which the bill secured, and the mode of claiming it in the affidavit would be a correct form of an affidavit of debt for its payment. The

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legal mode of considering this affidavit, is to say, that a debt for interest is legally claimed upon a contract which evidence must hereafter support, but which is stated with sufficient certainty to satisfy an affidavit of debt and a count in a declaration.

Steer, in support of the rule, contended, that the claim for interest here set forth must be taken as referable to the bill of exchange. That being the case, some date ought to appear in the affidavit, by which the Court might calculate the amount of interest due, and thus ascertain whether the amount claimed was due in point of law. If no such date were given, and only a gross sum stated, interest the most extravagant might be claimed by a plaintiff. It was not necessary that any sum should be mentioned as due for interest, if such a date as well as a sum were given. That was held in the case of *Rogers v. Gadbold* (a), where Chief Justice *Tindal* said, "That where a claim is made for principal and interest, and a sum and date are mentioned from which interest can be computed, it is sufficient." But if a party takes upon himself to state the amount which he claims for interest, he must shew some date, by which it will appear, that, according to the rate of legal interest, the sum which he claims is due. The affidavit being thus indistinct as to the amount due for interest, and being to be taken in connexion with a bill of exchange, it was in point of principle as indistinct and uncertain as if the amount of the bill itself had not been stated: if that were not stated, it was unnecessary to cite cases in order to shew that the affidavit was insufficient. But still, supposing this part of the affidavit not necessarily connected with the bill of exchange in the way last mentioned, the affidavit was bad so far as the interest was concerned. It was therefore

(a) Ante, p. 106.

bad as to part; and being bad as to part, it was bad as to the whole. He cited *Baker v. Wells* (a), where the Court of *Exchequer* decided, that where an affidavit of debt embraces several causes of action, and one of them is defectively stated, the defendant is entitled to be discharged *in toto* on entering a common appearance. And *Kirk v. Almond* (b), where the same Court held, that if an affidavit of debt on several promissory notes is defective as to some of them, the Court will discharge the defendant on filing common bail, and will not order bail to be taken to the amount of the note, as to which the affidavit is sufficient.

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WILLIAMS, J.—It is not necessary for me to consider on the present occasion, whether an affidavit of debt bad as to part is bad *in toto*. The question which I have here to consider is, whether the claim for interest, set up by the plaintiff in his affidavit of debt, is sufficiently stated. There is no doubt, that a party may be held to bail for interest due on a contract for interest. I must assume that interest was due on the contract which the plaintiff here seeks to enforce in this detached branch of the affidavit of debt. Then if it be due, nothing can be more distinct than the mode in which this affidavit states it to be due. The affidavit, therefore, appears to me to be good. The present rule must therefore be discharged.

Rule discharged.

(a) Ante, Vol. 1, p. 631.

(b) Id. 318.

1835.

ELDRIDGE v. FLETCHER.

After a judgment in the County Court has been set aside, though not at the instance of the parties, the Court will not compel the sheriff to issue execution on it.

KELLY shewed cause against a rule obtained by *Ryland* for a *mandamus* to be directed to the Sheriff of *Buckinghamshire*, commanding him to issue execution on a judgment by default suffered by the defendant. It appeared that a plaint in debt had been entered by the plaintiff in the County Court, and as the defendant did not plead thereto, interlocutory judgment was signed. A writ of inquiry was executed, and final judgment entered up for the sum of 5*l.* 17*s.*, there being three counts in the declaration, each of which claimed 1*l.* 19*s.* On this judgment the affidavits in support of the application stated, that the sheriff refused to issue execution. In answer to the rule, affidavits were adduced, from which it appeared that the sheriff had set aside the judgment before the rule for the *mandamus* was obtained. This, it was contended, completely answered the application, as it was impossible for the sheriff to issue execution on a judgment which had been set aside.

Ryland, in support of the rule, contended, that the sheriff had no right thus, without the knowledge of the parties, to set aside the judgment obtained by the plaintiff, and thus deprive him of all advantage accruing from his proceedings.

COLERIDGE, J.—If no judgment is now in existence, it will be of no advantage to the plaintiff that I should make this rule absolute for a *mandamus*. If the sheriff has acted illegally in setting this judgment aside, the plaintiff is not deprived of his remedy by my discharging this rule. Had it appeared that this judgment was set aside after this rule was obtained, I should have treated it as if it were still in existence. This rule must be discharged with

costs, because the sheriff is a public officer, and the parties were bound to ascertain the real state of the proceedings in the cause before they compelled him to appear before the Court in answer to such an application.

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Rule discharged, with costs.

WEBBER v. ROE.

GUNNING shewed cause against a rule obtained by *Biggs Andrews*, for judgment as in case of a nonsuit. The affidavit on which he shewed cause was made by the attorney for the plaintiff, and it stated that he had attended the last *Spring Assizes* for the county of *Suffolk*, when he was fully prepared to try his cause. On consultation, however, with his counsel, they were of opinion that it would be imprudent to have the cause tried by a common jury, and therefore advised that the record should be withdrawn, for the purpose of obtaining a special jury. Pursuant to this advice, the attorney, acting to the best of his judgment, withdrew the record.

It is a sufficient excuse in shewing cause against a rule for judgment as in case of a nonsuit, for not proceeding to trial pursuant to notice, that the cause was withdrawn, in order to obtain a special jury.

Biggs Andrews supported the rule.

WILLIAMS, J.—The affidavit is not very strong as an excuse; but, upon the whole, seeing the practice that has usually been adopted on these occasions, there is, I think, enough shewn to entitle the plaintiff to discharge this rule, on giving a peremptory undertaking to proceed to trial at the next assizes for the county of *Suffolk*.

Rule discharged accordingly.

1835.

BARKER v. PHIPSON.

If a sheriff who has seized goods under a *fi. fa.* receives notice of an intended *fiat* of bankruptcy against the defendant, he will be entitled to relief under the Interpleader Act, if he comes to the Court on the second day of the term after the assignees are appointed.

THIS was a sheriff's interpleader rule.

Harrison appeared on the part of the assignees.

Biggs Andrews appeared on the part of the execution creditor, and contended that the sheriff was too late in his application. The *fi. fa.* had issued on the 23rd *December*, and was received on the 24th. On the 28th, notice was received in writing by him that a *fiat* of bankruptcy was about to issue, and yet he never came to the Court for relief until the 16th *April* in the present term. He cited *Cook v. Allan* (a), the marginal note of which was, "where goods were taken in execution by a sheriff, and a claim being made to them, the sheriff was prevented from applying, by a rule obtained by the defendant in the action for setting aside the proceedings for irregularity, which rule was not disposed of till the 23rd *January*, when it was discharged:—Held, that the sheriff was too late in applying on the 31st *January*." On the authority of this case, it must be clear that the sheriff was too late in coming to the Court in this term.

Swann, on the part of the sheriff, contended, that he was sufficiently excused for not having come earlier to the Court, by the facts which the affidavit instructing him disclosed. Although notice of an intended *fiat* was served on the 28th *December*, no person was in existence who could legally be brought before the Court until the 7th *April*, when assignees were appointed. Even an official assignee was not appointed until the end of *Hilary* Term. The sheriff had notice of acts of bankruptcy committed by the defendant, and therefore it would not have been safe for him to have sold, as in case of

(a) Ante, Vol. 2, p. 11.

the *fiat* being granted the sheriff would be liable to an action, for it would relate back to the time when the act of bankruptcy was committed. He did come on the 16th *April*, which was the second day of term, and as early as he could with safety come to the Court. But the sheriff's affidavit stated, that from the 2nd *February*, he had been led to believe that negotiations for the settlement of the respective claims of the parties were going on. If the execution creditor was anxious to have the proceeds of the goods, he should have ruled the sheriff to return the writ, and then have issued a *venditioni exponas*, and then he might have had the proceeds, or the sheriff the opportunity of applying to enlarge the time for making his return, till assignees were appointed. From the 2nd *February*, the sheriff had been constituted the agent of the parties, and therefore he was entitled to receive his expenses of keeping possession since that period. In *Dabbs v. Humphries* (a), the Court held that the sheriff was entitled, where he applied under the Interpleader Act, to such expenses as he might incur as agent of the parties after his application.

WILLIAMS, J.—It appears to me that the present case is distinguishable from that of *Cook v. Allan*. The question is, whether such delay has taken place on the part of the sheriff as disentitles him to relief under the Interpleader Act. Sufficient excuse has in my opinion been given for not coming sooner to the Court. The appointment of assignees appears to have taken place subsequent to *Hilary* Term, and therefore I think his delay is explained. The present rule, therefore, must be enlarged, and an issue directed to try whether the goods seized are the property of the claimant or the defendant.

Rule accordingly.

(a) Ante, p. 377.

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If the agent of an attorney neglect to take out his certificate, and the latter continues in ignorance of the neglect to practise, he may be re-admitted on payment of a nominal fine, and the arrears of duty.

Ex parte THORPE.

KNOWLES applied to re-admit an attorney, without a term's notice. The facts disclosed in the affidavit on which he moved stated, that the applicant had been regularly admitted, and had taken out his certificate for a number of years. His last certificate expired in the month of *November*, in the year 1833. He carried on his business in the county of *Hertford*. Previous to the month of *October*, 1833, he disposed of his business. In the year 1834, before the month of *October* in that year, being desirous of resuming his business, he gave directions to his agents in town to take out his certificate, and to continue so to do regularly. This, he supposed they had done, until within a few days, when he discovered that they had neglected so to do. The present application therefore was, that he might be re-admitted without a term's notice. During the period which had elapsed since the expiration of his last certificate, he had not practised, except by preparing a lease, for which he had made and should make no charge. It was to be observed, that but for this neglect of the agent, the attorney would never have been off the roll. He cited *Ex parte Dent (a)*, where the circumstances were similar to the present, with the exception that there the attorney had continued to practise during the uncertificated interval. In that case the Court allowed him to be re-admitted, without a term's notice.

WILLIAMS, J.—I think, on the authority of that case, if the attorney pays 20*s.* fine, and the arrears of duty, he may be re-admitted without a term's notice.

Re-admitted accordingly.

(a) 1 B. & Ald. 189.

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STRAFORD v. LOVE.

ERLE shewed cause against a rule *nisi* obtained by *W. Clarkson*, for paying out of Court to the plaintiff the sum of 160*l.* 6*s.* 10*d.*, paid into the hands of the sheriff of *Middlesex*, in lieu of bail, under the 43 *Geo.* 3, c. 46, s. 2, and by him brought into Court; and also such sum as the Master should allow out of the sum of 10*l.*, also brought into Court, to answer the costs of the action. The supposed ground of this application was, that the defendant had not put in and perfected bail in due time, and therefore the plaintiff was entitled to have out of Court the money deposited, together with his taxed costs, to be deducted from the 10*l.* also paid in by the defendant. It was important in the present case to look to the dates of the proceedings. The defendant was arrested by virtue of a writ of *capias* on the 7th of *March*, and the sum sought to be recovered, together with 10*l.* for costs, was paid into the sheriff's hands. Pursuant to the command contained in the writ of *capias*, bail ought to have been put in on the 14th. The 15th was a *Sunday*, and the plaintiff would not be able to except until the *Monday*. He therefore could not compel a justification at the earliest until the 18th. The time for perfecting bail must consequently be taken to have been on the 18th. On that day, the defendant's attorney sent a letter to the plaintiff's attorney, proposing terms of arrangement between the parties. A correspondence then continued down to the 24th, when a letter was sent by the plaintiff's attorney, breaking off all further communication on the subject. On that day, the defendant paid into Court the additional 10*l.* mentioned in the 7 & 8 *Geo.* 4, c. 71, s. 2, to meet the further costs in the suit, the sheriff in the mean time having paid in the deposit. Under these circumstances, the plaintiff had applied to have his debt and taxed costs out of Court, as it was said that the

If, instead of putting in bail, a defendant deposits the amount of the debt, with 10*l.* for costs, pursuant to the 43 *Geo.* 3, c. 46, s. 2, he is not bound to pay in the additional 10*l.*, pursuant to the 7 & 8 *Geo.* 4, c. 71, s. 2, until the last day allowed for perfecting special bail.

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10*l.* ought to have been paid in on the 14th, the day on which the bail was to be put in, according to the requisition of the *capias*. But, although the language of the writ was in those terms, yet "putting in" did not necessarily mean justifying on the particular day in question. The defendant must be entitled to have time to perfect his bail according to the practice of the Court. If the defendant would have time to justify after the time of putting in bail, he would have the same time to pay in the 10*l.*; as the payments under the 43 *Geo.* 3, c. 46, and 7 & 8 *Geo.* 4, c. 71, must be viewed in the same light as bail. The language of the two acts of Parliament evidently treated them so. In *Newman and Another, Assignees, &c. v. Hodgson (a)*, which was an application by the plaintiff to take out of Court a similar deposit to the present, the Court said, "This is analogous to the case of an application to stay proceedings commenced upon a bail-bond, where bail has not been perfected in due time." Again, in *Rowe v. Softly (b)*, the marginal note of the case was, "When money is paid into the hands of the sheriff in lieu of bail, the defendant has, under the 7 & 8 *Geo.* 4, c. 71, till the time for perfecting special bail, for giving notice of his intention that the money shall remain in Court to abide the event of the suit." There, the language of Lord Chief Justice Tindal was very important. In speaking of the 7 & 8 *Geo.* 4, c. 71, s. 2, he said, "The act is remedial; it extends the provisions of the 43 *Geo.* 3, c. 46, which had been found beneficial in its operation, and the words used 'within such time as he could have been required to have put in and perfected special bail in the action, according to the course of the Court,' comprehend the whole time till the last day for perfecting special bail; and we put this construction upon it, the rather because it has no tendency to delay the plaintiff, for he could not declare in chief till

(a) 2 B. & Adol. 422.

(b) 6 Bing. 634; 4 Moo. & Payne, 464.

the time for perfecting special bail had expired." Under these circumstances, it was contended that the defendant had paid in the second 10*l.* in due time, and, therefore, that he had a right to have the money continued in Court, in order to try the cause upon its merits.

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W. Clarkson supported the rule, and submitted that the defendant was bound according to the exigency of the writ of *capias*, within eight days after the arrest, inclusive of the day of the arrest, to put in special bail, which must mean to perfect it by justification. That such was the meaning of the phrase "put in" in the Uniformity of Process Act was clear from the case of *Rex v. The Sheriff of Middlesex*, in a cause of *Wollaston v. Wright* (*a*), where it was held that a defendant must justify as well as put in bail in vacation, according to the 2 *Will.* 4, c. 39, s. 11, though he is arrested between the 10th *August* and the 24th *October*. The words of the section referred to in that case were, "special bail may be put in by the defendant in bailable process," during the vacation. In that case, the Court was referred to the language of the writ itself, as well as the third warning attached to it. The words of that warning were, "if a defendant, having given bail on the arrest, shall omit to put in special bail as required, the plaintiff may proceed against the sheriff, or on the bail-bond." The Court was, however, of opinion that when the act enabled the defendant to "put in" bail during the vacation, it required that those bail should be justified also. Now, the defendant in the present case had not done that which was equivalent to justifying bail on the day which the writ required, and, therefore, the plaintiff was entitled to have the money out. He also cited *Geach v. Coppin* (*b*), where it was decided, that if a defendant deposits money in the hands of the sheriff, pur-

(*a*) Ante, Vol. 2, p. 286.

(*b*) Ante, p. 74.

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suant to the 43 *Geo.* 3, c. 46, s. 2, which is paid into Court, he will not be allowed to take it out, unless he has put in bail, according to the exigency of the *capias*, although such a deposit is not mentioned in the warning attached to the writ. On the authority of these cases, the present rule ought to be made absolute.

Cur. adv. vult.

WILLIAMS, J.—This was a rule calling upon the defendant to shew cause why the sum of 160*l.* 6*s.* 10*d.* paid into the hands of the sheriff of *Middlesex*, in lieu of bail, and by him brought into Court, should not be paid out to the plaintiffs or their attorney, together with such sum as the Master should allow out of the sum of 10*l.* brought into Court, the defendant not having put in and perfected bail in due time.

This application is founded on the 43 *Geo.* 3, c. 46, s. 2, empowering the plaintiff to apply to the Court to have the first mentioned sum of money together with costs out of the sum of 10*l.* paid to him upon such default as in the rule is mentioned; and the question turns upon the construction of the 7 & 8 *Geo.* 4, c. 71, s. 2, which extends the provisions of the former act; or, in other words, the question is, whether the defendant has in this case made such default as entitles the plaintiff to have his rule made absolute. Both the statutes were clearly intended to operate in favour of defendants; and the latter in its terms is declared to be, and its provisions obviously are, in further extension of the former. The words of sect. 2 of the 7 & 8 *Geo.* 4, c. 71, are, "that it shall be lawful for such defendant, instead of putting in and perfecting special bail in the action, according to the course and practice of the Court, to allow the sum so deposited with the sheriff, and by him paid into Court as aforesaid, together with the additional sum of 10*l.* to be paid into Court by the defendant as a further security for the costs of the action, to remain in the Court to abide the event of the suit."

It is observable, that the object of both acts is to provide a substitute for putting in bail; and, in the case of *Newman and Another, Assignees, &c. v. Hodgson (a)*, the decision of the Court, (after consideration as the report states, and as I certainly believe was the case), proceeds expressly upon the ground, that motions of this sort are to be considered in the same light as proceedings formerly were against bail. I mention this only, because, in the cases referred to, the Courts have always shewn the strongest disposition to allow the merits of the original action to be tried, and have constantly been in the habit, after bail has been put in and perfected, to stay proceedings on the bail-bond regularly taken, upon the terms applicable to the state of each case. By parity of reasoning, I think we ought to construe this remedial statutory provision in such a manner as to allow the defendant to try the merits of the action, except there be something in the act which clearly contravenes that object; and the more so, as in cases of this sort the plaintiff has a security (as to the debt, at least) superior to the former one upon the bail-bond, by the deposit of the money itself.

The facts of the present case are as follows:—The arrest was on the 7th *March*; the time for putting in bail was therefore on the 14th. On the 18th, a letter from the defendant's attorney was sent to the plaintiff's attorney proposing an arrangement, and a correspondence was continued till the 24th, when a final refusal came from the plaintiff's attorney, and upon this latter day, (the 24th), the additional 10*l.* under sect. 2 of the 7 & 8 *Geo. 4*, c. 71, was paid into Court. Now, in the first place, I must premise, that I think the affidavit of the defendant's attorney, which does not rest in mere general terms, but discloses the letters which actually passed at the time, establishes the fact, that there was a *bonâ fide* purpose of attempting a compromise during the period above stated, (namely, from

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(a) 2 B. & Ad. 422.

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the 18th to the 24th of *March*), and that I must, therefore, consider the payment of the second 10*l.* as if it had been made on the 18th.⁴ The question therefore arises, whether the payment ought to be on the day for putting in bail (the 14th), or whether the defendant was entitled under this remedial act to any other and what extension of time. It is observable, that the expressions in sect. 2 of the latter act twice repeated, are, "put in and perfect special bail," and the effect of them has come under the notice of the Court of *Common Pleas* in the case of *Rowe v. Sofly* (a). The very point there arose, and underwent due consideration: the judgment having been delayed for the express purpose, as it is said, of ascertaining the practice of this Court. And the decision was, that the payment into Court of the second 10*l.* on the fourth day after the day for "putting in bail" was in time to prevent the plaintiff from having a rule like the present made absolute, because that was the day on which bail ought to be perfected. Now here, as the defendant was to have sufficient time to perfect his bail, how soon could he have been compelled to do so? The bail ought to have been put in on the 14th, and on that day a payment into Court equivalent to putting it in was made by the sheriff. The 15th was a *Sunday*, and therefore he could not except to the bail until *Monday*, so as to compel a justification before *Wednesday*, the 18th, until and during which day the defendant had clearly to justify. I must consider the 10*l.* as paid on the 18th, and, therefore, the deposit ought to remain in Court to abide the event of the suit.

Upon the authority, therefore, of the case last cited, and agreeing, as I do, for the reasons already given, with the principle on which it is decided, I think this rule should be discharged, but that the costs of the motion should be costs in the cause.

Rule discharged accordingly.

(a) 6 Bing. 634; 4 Moo. & Payne, 464.

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HAYNES v. POWELL.

DOWLING moved to set aside a writ of summons, on the ground of irregularity. The irregularity was, that there was no date in its *teste*. There was one difficulty in the case, which was, that the affidavit on which he moved was made by an illiterate person, and the *jurat* of it did not state that it had been read over to him, and that he appeared to understand the same. It was, however, made in the Court, and not before a commissioner. The rule of 31 Geo. 3, E. T., which required that such course should be pursued, only made mention of "commissioners." There might be some reason why such affidavits when made in Court should not be required to possess the same exactness, in the form of the *jurat*, as when made before a commissioner. When made in Court, it was to be presumed, that the judges who presided would not allow an illiterate person to be sworn unless they were convinced, that he was well aware of the contents of the affidavit which he made.

If an illiterate person is sworn in Court, or before a commissioner, the fact of the affidavit being read over to him, and his understanding it, must be stated in the *jurat*.

WILLIAMS, J.—The fact of its being sworn in Court can make no difference. The deponent is always sworn out of the view of the Court, and the judges are generally unaware of the fact of the affidavit being made. The constant practice, and that to which parties ought to adhere, has always been, that the *jurat* of affidavit, by illiterate persons should contain the statement, that the deponent had the affidavit read over to him, and that he seemed to understand it. At present, the rule cannot be granted on that affidavit. When the *jurat* is amended, the application may be renewed.

Rule refused.

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Ex parte CAROLINE HORE.

On an application against an attorney for an attachment for his contempt of a judge's order, made a rule of Court; the Court will take judicial notice of his being on the roll.

WHITE shewed cause against a rule obtained by *Chilton*, requiring an attorney to shew cause, why an attachment should not issue against him for his contempt of a judge's order, which had been made a rule of Court. As a preliminary objection, he contended, that the Court had no jurisdiction to inquire into the conduct of the gentleman, on whom the rule had been served; as it did not appear by the affidavits, that he was an attorney of this Court.

WILLIAMS, J.—It appears that this objection has already been taken in the case of *Ex parte King* (a), where the full Court, on an application to tax an attorney's bill, decided, that they would take judicial notice of the attorney being on the roll. I am bound by that case, and therefore I think sufficient is laid before me to enable me to entertain the application.

The case then proceeded, and was ultimately disposed of.

(a) *Ante*, p. 41.

Ex parte COWIE.

Directing an attorney to employ a proctor to obtain probate of a will is not such an employment of him in the character of an attorney as will give the Court summary jurisdiction over him, as to money received by him to pay the proctor.

C. CLARKE moved for a rule to shew cause, why an attorney of the Court should not pay over to the applicant a sum of 15*l.*, alleged to have been improperly retained by him, and why he should not answer the matters in

will give the Court summary jurisdiction over him, as to money received by him to pay the proctor.

the affidavit. The facts disclosed in his affidavit were these:—The attorney had been engaged for the applicant in transacting business of various descriptions. In the course of that employment, he received instructions to retain a proctor, in order to obtain probate of a certain will. The proctor was accordingly retained, and the amount of the sum which he charged for his services was stated to the client, and for it a check was given. This check was afterwards paid, and the attorney appropriated the proceeds to his own use. It was to compel the repayment of this sum, that the present application was made.

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WILLIAMS, J.—Any other person besides an attorney might have been instructed to employ a proctor to obtain probate; and yet, if he had appropriated the sum in question to his own use, the Court could not have interfered summarily to compel him to pay it over. The employment, therefore, of the attorney in this instance was not within the rule which the Court have laid down for themselves, in determining the cases in which they could interfere summarily against attorneys.

Rule refused.

RIMMER v. TURNER.

C. CLARK appeared on behalf of the sheriff of *Chester*, to shew cause against a rule for discharging the defendant out of the custody of the sheriff of *Chester* as to this suit.

If the debt and costs in an action are paid to the plaintiff, no matter by whom, the defendant is entitled to be discharged out

of custody. *Semble*, that the sheriff has no right to detain a defendant in custody, although he has been compelled to pay the debt and costs under an attachment.

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W. H. Watson, who obtained the rule, objected to his appearing on behalf of the sheriff, as the rule was against the plaintiff only.

C. Clark contended, that the rule had been served on the plaintiff: he had received his instructions from *Mr. Hudson*, the deputy in *London* of the sheriff of *Chester*, who had made an affidavit in answer to this application, and had appended to his affidavit a copy of the rule; he was therefore entitled to be heard. This was an application to discharge the defendant out of custody, at the suit of the plaintiff, on the ground that the debt and costs had been paid. The affidavit on which the rule had been obtained did not state that the debt and costs had been paid by the defendant, but merely that they had been paid, as the defendant believed, by an agent of the sheriff. That affidavit did not state that the plaintiff had given the sheriff a written order for the discharge of the defendant. The books of practice stated such an authority to be necessary. The affidavit of the defendant shewed, that it would be against justice to grant this application, which would enable him to take advantage of his own wrong, as the debt and costs had in fact been paid by the sheriff under an attachment. This application had been made to *Mr. Justice Bosanquet*, at chambers, and that learned Judge had refused to entertain it, holding that, under the circumstances of this case, the sheriff must be considered as a trustee.

W. H. Watson, in support of the rule, contended that the plaintiff was bound to discharge the defendant out of custody on payment of debt and costs. He was obliged also to sign an authority to the sheriff for the discharge of the defendant, and if he refused so to do, an action on the case would lie against him on that account. And the mere refusal to sign the discharge would be sufficient

prima facie evidence of malice in the absence of circumstances to rebut the presumption. For these propositions he cited *Croser v. Pilling & Moore* (a). Then, with respect to the sheriff, if he had paid the debt and costs, there was no pretence for his keeping the defendant in custody. He cited *Pitcher v. Bailey* (b), where it was held, that if an officer permit a prisoner to go at large on his promise to pay the debt to the creditor, in consequence of which he is obliged to pay the creditor himself, he cannot recover back the money from the debtor, being guilty of a breach of duty, out of which he can derive no cause of action. If a sheriff were fixed by an attachment, his sole remedy was on the bail-bond. He must bring his action on the bond, and had no right to impound the body of the defendant, by way of security to himself for the debt and costs he had paid under the attachment.

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WILLIAMS, J.—I must look to the rule, in order to see who are the contending parties. The sheriff is not named in the rule; and then the question is, whether the defendant is to be detained by the plaintiff, who has received the debt and costs. He has no such right to detain the defendant.

Rule absolute, with costs.

(a) 4 B. & C. 26; 6 Dowl. & Ryl. 129.

(b) 8 East, 171.

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YOUNG v. MALTBY.

If a defendant has deposited money in lieu of bail, which the sheriff pays into Court, he is entitled to take it out on justifying bail in due time.

If the affidavit on which such a motion is made states bail to have been justified, the Court will presume that it has been justified in due time, unless the contrary be shewn by the plaintiff.

KNOWLES shewed cause against a rule obtained by *Humfrey*, for the purpose of taking out of Court a sum of 40*l.*, and 10*l.* for costs, which had been deposited in lieu of bail, pursuant to the 43 *Geo. 3*, c. 46, special bail having been justified. The affidavit on which the application was founded was defective, because, although it stated that bail had been justified, it did not go on to shew that it had been justified in due time. Unless bail were put in and justified in due time, the defendant could not be entitled to have the money out of Court. The affidavit, however, only stated, that bail had been justified. He cited *Geach v. Coppin* (a), the marginal note of which case was, that "If a defendant deposits money in the hands of the sheriff, pursuant to the 43 *Geo. 3*, c. 46, s. 2, which is paid into Court, the defendant will not be allowed to take it out unless he has put in bail according to the exigency of the *capias*, although such a deposit is not mentioned in the warning attached to that writ. If, however, bail has been perfected, but not in due time, before the plaintiff takes the money out, he must make his election as to which security he will take." This case shewed the necessity there was for the defendant's affidavit stating that bail had been perfected in due time.

Humfrey, in support of the rule, contended, that it being stated in the affidavit of the defendant that bail had justified, it must be taken that they had justified in due time, until the contrary was shewn by the plaintiff.

WILLIAMS, J.—It having been sworn that bail was justified, I must presume that it was justified in due time,

(a) Ante, p. 74.

unless an affidavit be produced on the part of the plaintiff, shewing that it was not. The present rule must, therefore, be made absolute.

Rule absolute.

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PAWSEY v. GOODAY.

H. WILLIAMS applied for a *certiorari* to remove the record in this case out of the Borough Court of *Bury St. Edmunds*, in order to issue execution out of this Court, the defendant having removed himself out of the jurisdiction. The only question was, whether the rule ought to be absolute or *nisi* in the first instance. In one case in the Court of *Exchequer* it had been granted absolute in the first instance.

A rule for a *certiorari* to remove a record from an inferior jurisdiction is absolute in the first instance.

WILLIAMS, J.—You may take your rule absolute in the first instance.

Rule absolute accordingly.

REX v. ROGERS.

ADDISON moved for an attachment against the defendant in this case for not paying costs pursuant to the *allocatur* of the Master of the Crown Office. The only question was, whether the attachment could be obtained on an affidavit which was dated on the 2nd *February*, and which stated the demand and default to have been made that day, which had arrived too late to make any motion in the case in *Hilary* term. This was the 22nd *April*, but the length of time which had elapsed since the 2nd *February* was immaterial, because the contempt was incurred by the

An attachment for nonpayment of costs may be obtained on the 22nd *April*, although the affidavit does not shew that any demand was made since the 2nd *February*.

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party in not paying the sum required when duly demanded. If, perchance, the defendant had paid the money, that might be a ground for setting aside the attachment.

WILLIAMS, J.—You may take your rule.

Rule granted.

GREENWOOD v. JOHNSON.

If an arbitrator, to whom a cause is referred by order of *Nisi Prius*, takes no notice in his award of a power given him by the order to give the defendant his costs, on the ground of an excessive arrest, but does dispose of the general costs of the cause, the Court will not interfere to give the defendant his costs.

R. C. HILDYARD moved for a rule *nisi* to give the defendant his costs under the 43 *Geo. 3*, c. 46, s. 3, on the ground that he had been arrested for a larger sum than the plaintiff ultimately recovered, without reasonable or probable cause. The defendant had been arrested for 109*l.* 7*s.* 6*d.* The cause came on for trial at the *Spring Assizes* for the county of *York*, when it was referred. By the order of *Nisi Prius* the same power was given to the arbitrator as the Court would possess with reference to the defendant's costs. The arbitrator directed that the defendant should pay the plaintiff the sum of 50*l.* 6*s.* 0½*d.*; and he further awarded in the terms of the order of reference (which was the ordinary printed form) that the costs should follow the result of the award. But he said nothing about the costs of the defendant, on account of the discrepancy between the sum awarded and the sum for which the arrest took place. The question now was, whether the Court would not interfere to make the plaintiff pay the defendant his costs, as, unless such interference did take place, the defendant would be without remedy.

WILLIAMS, J.—Were I to grant such a rule as the one now prayed, I should be infringing on the province of the arbitrator; the question, whether the arrest was without

reasonable cause, being peculiarly within his knowledge who heard the evidence. As, therefore, power was given to him to make an order with respect to the defendant's costs, in the same manner as the Court might, and as he has made no such order, the fair conclusion is, that he has declined exercising that power. He being a competent authority upon this point, I cannot interfere with his discretion by granting the present rule.

Rule refused.

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CHARNOCK v. SMITH.

MILLER moved for a rule to shew cause why the verdict found for the plaintiff should not be set aside, and a new trial had, on the ground of a defect in the notice of trial before the sheriff. It had been given for *Easter Tuesday*, and afterwards continued till a subsequent day. On that day the trial came on, and a verdict was found for the plaintiff. According to the effect of the 3 & 4 Will. 4, c. 42, s. 43, *Easter Tuesday* had become a *dies non*. The words of the section were "none of the several holidays mentioned in the 5 & 6 Edw. 6, c. 3, shall be observed or kept in the said courts, or in the several offices belonging thereto, except *Sundays*, the day of the Nativity of our Lord and the three following days, and *Monday* and *Tuesday* in *Easter* week." The two last-mentioned days being thus in the situation of holidays were *dies non*. No business of the Courts could be done on those days, and therefore a notice of trial for either of them could not be good. If the original notice was bad, the continuation of it would not cure the defect. The verdict, therefore, in pursuance of such notice, ought to be set aside.

A notice of trial
before the sher-
iff for *Easter*
Tuesday is good

WILLIAMS, J.—The 11 Geo. 4 & 1 Will. 4, c. 70,

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s. 6, in making provisions for the duration of the terms, contained this proviso, "that if the whole or any number of the days intervening between the *Thursday* next before and the *Wednesday* next after *Easter* day shall fall within *Easter* term, there shall be no sittings *in banc* on any of such intervening days." Then by the 1 *Will.* 4, c. 3, s. 3, it was provided "that, in case any of the days between the *Thursday* next before and the *Wednesday* next after *Easter* day shall fall within *Easter* Term, then such days shall be deemed and taken to be a part of such term, although there shall be no sittings *in banc* on any of such intervening days." Last of all came the general rule of *Hilary* Term, 2 *Will.* 4, by which it was ordered "that the days between the *Thursday* next before and the *Wednesday* next after *Easter* day shall not be reckoned or included in any rules or notices of other proceedings, except notices of trial and notices of inquiry in any of the Courts of law at *Westminster*." From this rule, which was promulgated by all the Courts, we may learn the construction which the Judges were of opinion ought to be put on the two acts of Parliament to which I have referred; and in that rule is contained the exception as to notices of trial and inquiry. Although, therefore, for all other purposes these two days would be unavailable, yet, for notices of trial and inquiry, they are available. The present case comes directly within the exception in the rule, and therefore the notice of trial, as it appears to me, was good. You will consequently take nothing by your motion.

Rule refused.

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SMITH v. STERLING.

CHADWICKE JONES shewed cause against a rule nisi, obtained by *Erle*, for issuing a writ of *procedendo* into the Palace Court. The facts, as they appeared in the affidavit of the plaintiff's attorney, and which were not denied on the part of the defendant, were these: an action was brought in the Palace Court, in which the defendant suffered judgment by default. A writ of inquiry was executed, and a verdict found by the jury. After this, a writ of *habeas corpus* was issued to remove the cause. The present rule nisi was then obtained for a *procedendo*, on the ground that the *habeas corpus* had been sued out too late. He contended that, according to the language of the 21 Jac. 1, c. 23, s. 2, the *habeas corpus* had not issued too late. That section empowered the officers of the inferior court to proceed, "except the said writ or writs be delivered to the steward or stewards, judge or judges, officer or officers, of the said court, before issue or demurrer joined in the said cause or causes so depending or to be depending in any such court of record." That section only applying to cases where "issue or demurrer" was joined, could not apply to a case of this sort, where no issue or demurrer was joined. Here, an interlocutory judgment had been signed, and such a judgment, it had been held, was not within the meaning of the statute. In the case of *Cox v. Hart* (a), the marginal note was, "though *habeas corpus* was not delivered to the Sheriff's Court in *London* till after interlocutory judgment and notice of inquiry, yet *procedendo* denied." In *Bevan v. Prothesk* (b), it was held that a writ of *re. fa. lo.* stays all further proceedings in a county court, though delivered after interlocutory, if before final judgment. Under

If a writ of *habeas corpus* to remove a cause from the Palace Court, wherein judgment has been suffered by default, is not delivered until after the jury have assessed the damages on the writ of inquiry, the Court will issue a *procedendo*.

(a) 2 Burr. 758.

(b) 2 Burr. 1151.

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these circumstances, and on the authority of these cases, he submitted that the present rule must be discharged.

Erle, in support of the rule, contended that if the present case did not come within the exact words of the statute of *James*, it certainly came within the mischief intended to be remedied by it, as well as that of the 43 *Eliz.* c. 5, in furtherance of which the more modern statute was passed. The preamble of the statute of *Eliz.* stated the inconveniences which were formerly felt in consequence of the abuse of writs of *certiorari* and *habeas corpus*, which defendants were in the habit of suing out, and then keeping them in their pocket, without producing them, till issue was joined, the jury sworn, and the plaintiff had given his evidence, by which means the plaintiff was not only put to considerable expense, but the defendant, knowing beforehand what proofs he could produce, had an opportunity of opposing them by false witnesses. For the purpose of remedying this mischief it was enacted, that "no writ or writs of *habeas corpus*, or any other writ or writs sued forth, or to be sued forth, by any person or persons whatsoever, out of any of her Majesty's courts of record at *Westminster*, to remove any action, suit, plaint, or cause, depending or to be depending in any court or courts within any city or town corporate or elsewhere, which have or shall have jurisdiction, power, or authority to hold plea in any action, plaint, or suit, shall be waived or allowed by the judge or judges, or officer or officers of the court or courts wherein or to whom any such writ or writs shall be delivered, (but that he and they shall and may proceed in the said cause and causes ready to be tried, as though no such writ or writs were sued forth or delivered to him or them), except that the said writ or writs be delivered to the judge or judges, officer or officers, of the said court, before that the jury, which is to try the cause in question between the party

or parties plaintiff and the party or parties that sued forth the said writ or writs, or for whose benefit the said writ or writs is or shall be sued forth, have appeared, and one of the said jury sworn to try the said cause." Then, in furtherance of the same object, the 21 *Jac.* 1, c. 23, s. 2, provided, that, notwithstanding such writs being delivered, the judges of such courts shall and may proceed in the said cause or causes, although no such writ or writs were sued forth or delivered to him or them, except that the said writ or writs be delivered to the steward or stewards, judge or judges, officer or officers of the said court, before issue or demurrer joined in the said cause or causes so depending." The object of this second act of Parliament was clearly to give greater effect to the provisions of the statute of *Eliz.*, and certainly was not intended to restrain it. Yet the argument on the other side must go to the extent of supporting the latter proposition. With regard to the case of *Cox v. Hart*, the decision there appeared to have proceeded, according to the report, rather on the statement of the practice which had existed previous to the statute of *James*, than upon the language and intention of the two acts of Parliament. This was the opinion suggested by the reporter himself in a note to the case. There, however, the writ of inquiry had not been executed, as in the present case. But a contrary decision had been pronounced in the case of *Wyatt v. Markham* (a). There the case, as stated by the reporter, was in these terms:—"Moved for a *procedendo* to *Boston* Borough Court; *habeas corpus* to remove the cause, being brought after interlocutory judgment in the inferior Court. The Court thought it too late after judgment, and made the rule for *procedendo* absolute." Subsequently, however, in the case of *Walker v. Gann* (b), where the marginal note was—"It is a general rule that *certiorari* does not lie to remove

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(a) Barnes, 221.

(b) 7 D. & R. 769.

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a cause from an inferior court, after judgment signed there, especially where the defendant suffered judgment by default;" in that case the remarks of Mr. Justice *Holroyd* were very important:—"I think," said his Lordship, "it is a sound and wholesome general rule, that a cause shall not be removed from an inferior jurisdiction after judgment has been signed there; and I think the rule is particularly applicable where the defendant suffers judgment to go by default in the first instance, and then applies for a *certiorari*, for such conduct is clearly oppressive, and within the mischief intended to be remedied by the statute." As to *Bevan v. Prothesk*, on the question of the time when a *re. fa. lo.* would stay proceedings, that writ depended on certain particular acts of Parliament, from which no precedent could be drawn as to the case of a *habeas corpus*. The present rule ought, therefore, to be made absolute.

Cur. adv. vult.

WILLIAMS, J.—This was a rule for a *procedendo* to be directed to the Palace Court, commanding the Judges of it to proceed with the cause. A writ of *habeas corpus* was issued by the defendant, after suffering judgment by default, but which was not delivered to the proper officer until after the jury had assessed the damages on the execution of the writ of inquiry. The question is, whether the case comes within the stat. of *Elix. c. 5, s. 2.* (His Lordship then read the preamble and section.) On the preamble and the section it is observable, that the terms are as large as they need be to embrace every possible case of removal from an inferior court to those at *Westminster*, where a jury is sworn. With regard to the stage of the proceedings, at which, the removal may take place, a question has been attempted to be raised on the statute of *James*, and it has been suggested that it has restrained and limited the meaning of the 43 *Elix. c. 5.* On that suggestion I cannot avoid observing that it would be some-

what singular if the former act of Parliament, which is *in pari materia*, and with a similar object to the latter, should be repealed by it, without substituting some more ample remedy. It would require very strong reasoning or very cogent authority to induce me to come to the conclusion that such was the intention of the legislature. The stat. of *James* recites in its preamble grievances similar to those mentioned in the stat. of *Elix.* But it is contended that, because the words which direct the time at which the writ removing the cause must be delivered are, "before issue or demurrer joined," therefore a judgment by default is not within that act, there being neither issue nor demurrer joined in such a case. But, if the stat. of *James* had not passed, there are words sufficiently extensive in the stat. of *Elix.* to embrace such a case as the present. It has never been suggested, that the words of the stat. of *Elix.* would not extend to such a case. It is true that the case of *Cox v. Hart* has been referred to, but there no jury had been sworn. The case of *Wyatt v. Markham*, however, is a contrary decision. In the more modern case of *Walker v. Gann* the question as to a judgment by default in the inferior court, where the writ of inquiry had been executed, directly arose, and the Court was of opinion that, as the verdict of the jury on the writ of inquiry had passed, the *procedendo* ought to issue. There Mr. Justice *Holroyd's* remarks, as to removals from inferior courts after judgment by default, were exceedingly strong. In the late case of *Godley v. Marsden (a)*, the Court of *Common Pleas* held that, where a cause was removed from an inferior court, after interlocutory judgment and before inquiry, a *procedendo* would be refused. The present case is, however, distinguishable from that, because here the verdict of the jury on the writ of inquiry has actually passed, and therefore the case is directly within that of *Walker v. Gann*. As no case

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(a) 4 Moo. & Payne, 138; 6 Bing. 433.

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has been cited, which shews that the general words of the stat. of *Elix.*, as to cases where a jury is sworn, have been limited by the provisions in the stat. of *James*, and on the authority of the case of *Walker v. Gann*, I am of opinion that the present rule ought to be made absolute for a *procedendo*.

Rule absolute.

LAWRENCE v. WALKER.

If a claim against an insolvent at the time of making his schedule depends upon a contingency, it is not barred by the act.

HUMFREY shewed cause against a rule *nisi*, for an attachment for not paying money, pursuant to a rule of Court. The question was, whether the defendant had or had not been freed by his discharge under the Insolvent Debtors' Act from the claim, for the non-satisfaction of which the present rule for an attachment was obtained. The case was this:—The defendant was living separately from his wife, who was supported by the plaintiff. An action was brought by the latter for the maintenance of the wife, and a verdict found in his favour to the amount of 15*l.* 12*s.* The amount of the costs was 35*l.* It was then agreed by both parties, that the Judge who tried the cause should direct the mode in which the verdict and costs should be satisfied, as well as the mode in which the defendant should contribute to the maintenance of his wife. The learned Judge accordingly drew up an order of *Nisi Prius*, the terms of which were, that the defendant should pay the amount of debt and costs by instalments of 5*l.* per month, and that for the future, so long as he continued a junior pilot, he should pay eight shillings per week for the support of his wife, and when he became a senior pilot, he should pay ten shillings per week for her support. This order of *Nisi Prius* so drawn up was afterwards made a rule of Court. Subsequently, the defendant took the benefit of the Insolvent Act. The claim, as respected the debt and

costs, was stated in his schedule. The object of the plaintiff was to recover the weekly payments, which had become due since the defendant's discharge. The question was, whether under s. 50 or s. 51 of the 7 Geo. 4, c. 57, the defendant was freed from his liability to pay the ten shillings a week under the rule of Court, he having now become a senior pilot. The words of s. 50 were, "That the discharge of any prisoner *so adjudicated as aforesaid*, shall and may extend to all process issuing from any Court, for *any contempt* of any Court, ecclesiastical or civil, for *non-payment of money* or of costs or expenses in any Court ecclesiastical or civil; and that in such case the said discharge shall be deemed to extend also to all costs, which such prisoner would be liable to pay in consequence or by reason of such contempt, or on purging the same; and that every *discharge so adjudicated as aforesaid*, as to any debt or damages of any creditor of such prisoner, shall be deemed to extend *also to all costs* incurred by such creditor *before the filing of such prisoner's schedule*, in any action or suit brought by such creditor against such prisoner for the recovery of the same." Those of s. 51 are "That the discharge of any such prisoner so adjudicated as aforesaid shall and may extend to any sum and sums of money which shall be payable, *by way of annuity or otherwise*, at any future time or times, by virtue of any *bond, covenant*, or other securities of *any nature whatsoever*; and that every person and persons who would be a creditor or creditors of such prisoner for such sum or sums of money, *if the same were presently due*, shall be admissible as a creditor or creditors of such prisoner, for the value of such sum or sums of money so payable as aforesaid, which value the said Court shall, upon application at any time made in that behalf, ascertain, *regard being had to the original price* given for such sum or sums of money, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the time of filing such prisoner's petition."

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Under the words of either the former or the latter of these sections, the debt now sought to be recovered against the defendant must be considered as barred. It might be compared to the case of an annuity under sect. 51. The whole of an annuity was not due at the time of an insolvent's petition, but as the value of it was capable of being ascertained, the discharge under the act was held to relieve the insolvent from such a claim. Here, a similar calculation might be made, and, therefore, the discharge would equally free the defendant from his liability.

F. V. Lee contended, that sect. 50 must be construed with reference to sect. 46, which authorized the prisoner's discharge from the "several debts and sums of money due, or claimed to be due at the time of filing such prisoner's petition, from such prisoner to the several persons named in his or her schedule as creditors, or claiming to be creditors for the same respectively, or for which such persons shall have given credit to such prisoner before the time of filing such petition, and which were not then payable;" and then it was clear that sect. 50 only released defendant from those contempts for the nonpayment of money, or of costs and expenses which existed at the time of his discharge, as also the costs occasioned by the contempt, or on paying the same; and that construction was further strengthened by the words, "and that every discharge so adjudicated as aforesaid as to any debt or damages shall be deemed to extend also to all costs incurred by such creditor before the filing of such prisoner's schedule in any action or suit brought." Now it was clear in the present application, that this was neither a debt, due or claimed to be due at the filing of the petition, nor anything for which plaintiff had given defendant credit before filing the petition within sect. 46; nor was it any contempt for the nonpayment of money, costs, or expenses in any Court ecclesiastical or civil within the meaning of sect. 50; that the act of Parliament only applied to claims which existed

at the time of the decision, and which were certain in themselves, or might be rendered so by calculation.

Then, as to sect. 51, although the words "that the discharge of any such prisoner so adjudicated as aforesaid shall and may extend to any sum or sums of money which shall be payable by way of annuity *or otherwise* at any future time or times by virtue of any bond, covenant, or other securities *of any nature whatsoever*," were sufficiently large to comprehend the present case; yet when the Court looked to the words in the latter part of the section, the value of the securities contemplated by this section were to be ascertained, "regard being had to the *original price* given for *such sum or sums of money*, and making therefrom such diminution in the value thereof as shall have been caused by lapse of time since the *grant* thereof," which clearly shewed, that the section was never intended to apply to a case like the present, but to those cases only, where a sum of money had been originally given to secure an annuity or other payment to the grantee. Then the party advancing the money might prove for the value of such amount or other payment, the value to be ascertained with reference to the time it had been granted, and the original value given for the same. But it was impossible to render this claim of ten shillings a week certain, because it was in its nature perfectly contingent, and incapable of being ascertained. He cited *Lloyd v. Neele* (a), where it was held, that a discharge under the Insolvent Debtors' Act does not bar an action of trespass, where the cause of action arose before the insolvent went to prison, and the damages were unliquidated before the discharge. In *Walmer v. White* (b), it was held, that an insolvent is not exonerated from damages unascertained at the time of his discharge, although the action in which they are sought to be recovered was commenced, and judgment by default

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(a) 2 Chitt. Rep. 222.

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(b) 3 M. & P. 671; 6 Bing. 291.

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suffered, prior to his first imprisonment. These cases sufficiently shewed, that where the demand was in itself uncertain and not capable of being rendered certain, it was not discharged by the Insolvent Act. Nothing could be more uncertain than a debt depending on a contingency. In *Hilton v. Worrell* (a), it was held, that a debt depending on a contingency at the time of a party's discharge under the Insolvent Act, is not thereby discharged. That was a case under the 18 Geo. 3, c. 52, but the words of it were similar in meaning to those of the present. The words of that act were "owing, occasioned, or growing due." The Court there said "this is no debt at all, till the event has happened." The same remark might be made in the present case; for *non constat*, that the defendant ever would become a senior pilot. Under these circumstances, and on the authority of the cases cited, the present rule ought to be made absolute.

WILLIAMS, J.—It seems to me, that the debts and claims from which a defendant is discharged by the Insolvent Act must be such as are either certain in themselves or capable of being rendered so. Therefore, as this contingency mentioned in the order of *Nisi Prius* was incapable of being ascertained at the time the schedule of the defendant was formed, it is not discharged by the act. The case is clearly not within sect. 50 of the act. Sect. 51 speaks of a calculation, which may be made in the case of an annuity. There, something like *data* are furnished for the calculation: but here, none exists; as, from the nature of the claim itself, none can exist. No sufficient cause having been shewn against this rule for an attachment, the rule must be absolute with costs.

Rule absolute, with costs.

(a) 2 Chitt. Rep. 448.

COURT OF COMMON PLEAS.

Easter Term,

IN THE FIFTH YEAR OF THE REIGN OF WILLIAM IV.

DUKES v. GOSTLING.

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THIS was an action on the case tried at the *Middlesex* Sittings, in *Michaelmas* Term last, before Mr. Justice *Park*, when a verdict was found for the plaintiff, 30*l.* damages, with leave to the defendant to move to enter a nonsuit. The declaration stated that the defendant demised to the plaintiff, for a term not yet expired, among other things, a certain close of land, and a pond full of water, in and upon the said close, situate in the parish of *Islington*, in the county of *Middlesex*. That, at the time of committing the grievance by the said defendant hereinafter mentioned, the plaintiff was, and hitherto hath been, and still is, under and by virtue of the said demise, lawfully possessed of the said close of land, with the appurtenances, situate as aforesaid, and of the said pond full of water. That the said defendant, *before* and at the time of the committing of the grievance hereinafter mentioned, was possessed of a certain close of land, used and employed by the said defendant as a private road, and adjoining the said close of land of the plaintiff, and the said pond full of water in the said close; nevertheless, the defendant, contriving and intending to injure, &c. the said plaintiff, and to deprive him of the use and benefit of the said pond full of water, whilst the said plaintiff was so pos-

In an action on the case, the defendant cannot now, under the plea of "not guilty," raise any objection as to defective proof of the inducement in the declaration.

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sessed of the said pond of water, to wit, on the 1st day of *May*, 1833, and on divers other days and times between that time and the time of the commencement of the suit of the said plaintiff against the said defendant in this behalf, wrongfully and injuriously cut, dug, and made, *in his said close, and used as a private road as aforesaid, a certain large sewer*, close to and adjoining the said close and the said pond of water of the said defendant, and kept and continued, and caused to be kept and continued, the said sewer, adjoining to the said close and the said pond of water of the said defendant, for a long space of time, to wit, from thence hitherto, and thereby during all the time aforesaid, wrongfully drew off and diverted large quantities of the water of the said pond; and the said plaintiff thereby, for want of sufficient water in the said pond, could not, during that time, use, occupy, and enjoy his said close and his said pond full of water, as he otherwise might, could, and would, and ought to have done. To this "not guilty" was pleaded, and on that issue was joined.

The evidence at the trial was, that the plaintiff had given the defendant leave to make a road through the pond and field, on condition of his making a reduction of 10*l*. in his annual rent, and taking care that the pond was supplied with water, which the plaintiff wanted for his cows. The pond had never been empty within the memory of any of the witnesses, although they remembered many dry summers. To make the road, which was to go through the centre of the pond, the defendant drained off a quantity of the water, and then built a sewer to carry it away under the road, so that it might not injure the road. The road was *afterwards* made over the sewer, but the greater part of the water was gone before the sewer was finished. The size of the pond was reduced by one half, but the defendant had it puddled; and deepened a trench that formed a communication between the pond and a moat

near his house, and for some time had water scooped out of the moat into the trench. It was upon his ceasing to do so that the pond became quite dry, and the plaintiff brought this action. A shaft was made from the sewer, and raised two feet above the bottom of the pond, so as to prevent the escape of any water down the sewer till it was two feet deep in the pond, and, in fact, none ever did escape down the sewer, the water never, after it was built, having been so high.

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Spankie, Serjt., last term moved for, pursuant to leave, and obtained, a rule, calling upon the plaintiff to shew cause why a nonsuit should not be entered, on the ground of variance between the declaration and the evidence as to the sewer being the cause of the mischief complained of.

Byles shewed cause.—The objection on the other side is, that the injury the plaintiff had sustained could not have arisen as stated in the declaration from cutting and digging the sewer through the road, because the road was made after the sewer. It is to be observed, however, that the sewer was laid as a continuing nuisance, so that if it was not at first the occasion of our pond being emptied, we are entitled to recover on account of its diminishing the utility of the pond to us, which injury is correctly described. But it might be fairly contended, that there was no variance. The difficulty arose upon the words “used as a private road.” The question is, whether this expression referred to the time when the action was brought, or to the time when the injury was committed? The authorities would shew that it referred to the former, and in that case the evidence of the use of the close at the present time, viz. as a private road, would agree with the description in the declaration.

TINDAL, C. J.—But you say in the declaration that the

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"defendant, *before* the time of the committing of the grievance hereinafter mentioned, was possessed of a certain close of land used and employed," &c.

Byles.—Yes, the defendant was, before the commission of the grievance, possessed of a certain close of land, and as the participle "used" *followed* the verb, it must be construed as if it were written "*now* used," the participle not partaking of the tense of the verb when it followed as when it preceded the verb. In *Viner's Abridgment*, title *Declaration*, it was said, that land cannot be demanded now but by the name as it now is. Other authorities might be quoted:—*Sir Nicholas Poynts's* case (a); *Bridge's* case (b); the *King v. Mary Somerton* (c); the *King v. Ward* (d). But even if it be a variance, it is one which might have been removed by amendment of the record. *Hill and others v. Salt* (e). Supposing all these points to be against the plaintiff, it would yet be impossible for the defendant to surmount the objection to his application, offered by the new rules of pleading. Under the head of "Pleadings in particular Actions," the effect of the plea of *not guilty* is thus described: "In actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial shall be admissible under that plea: all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration." Now the matter in our declaration complained of is clearly matter of inducement, and the defendant, not having traversed it, has admitted it. He has pleaded not guilty, but that is only an answer to the

(a) Cro. Jac. 214.

(b) Id. 639.

(c) 7 B. & C. 463.

(d) 2 Lord Raym. 1468.

(e) 2 Crom. & Meeson, 420.

injury. Therefore there was no variance. If there were one, it was immaterial; but, whatever it was, the new rules of pleading precluded the defendant's taking advantage of it under the general issue.

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Spankie, Serjt., and *Knowles*, in support of the rule.—Without denying, as a general proposition, that where there are no words in the declaration to mark the time to which an averment referred, the time would be considered as that at which the declaration was drawn, it was sufficient to say, that here there were words in the declaration which marked the time. That distinguished this case from the one in *Croke*, relied upon on the other side; for there the absence of the words "*ad tunc*" left the time uncertain; whereas, in this case, the time was fixed by the words "before and at the time of the committing of the grievance." Besides, the Court would look to the construction of the *English* language and not to the *Latin*, in which the pleadings were carried on at the time of the greater part of the cases referred to on the other side. As to the plea of the general issue having admitted the inducement to be correct, all that it admitted was, that, at the time of the commission of the grievance, we were possessed of a close used and occupied as a road. It still remained necessary for the plaintiff, in order to support his allegation, to shew, that we cut a trench in that private road; and that he could not do, for the proof was, that the trench was made before the road. The new rules of pleading did not therefore apply.

TINDAL, C. J.—The question is, whether the defendant is entitled to a nonsuit. It appears to me, that his objections have been answered, for the declaration is in substance, that the plaintiff being lawfully possessed of a close and pond of water, the defendant did in a certain

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close of his own dig a trench from the pond, and thereby carried off its water. But there is this inducement in a part of the declaration, "That the said defendant, before and at the time of the committing of the grievance herein-after mentioned, was possessed of a certain close of land used and employed as a private road." This gives rise to the first objection, for the defendant says, that it was not used as a road at the time the injury was committed.

The expression is equivocal as to time; and, if it stood without reference to the new rules of pleading, it must be set at rest by evidence, if it were material. I do not, however, think it material whether the close was a road or an orchard, for it is not the mode of enjoyment of his land, but the act done by the defendant, which is the subject of complaint; and if the whole of this inducement were omitted, the declaration would still be good. Further, the pleading rules of *Hilary Term, 4 Will. 4*, preclude the defendant from taking this objection. [His Lordship here read the first rule under the fourth head of Pleadings in Particular Actions.] The defendant in this case, therefore, having pleaded not guilty, cannot dispute this inducement. It is also objected by the defendant that the declaration alleges the water to have been drawn off by the trench or sewer made by him, whereas the proof is, that the pond was emptied before the drain was made. To this it is, however, properly answered, that the declaration complains not only of the digging of the trench, but of its continuance, so that the water cannot rise to the height it before did.

GASELEE, J.—If it were necessary to deliver an opinion as to the time referred to by the word "used," I should say that I thought it referred to the time at which the injury was committed, and not to the time when the action was brought. It is, however, unnecessary to deliver any

opinion upon that point, for I think the new rules of pleading decisive against the defendant.

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PARK, J., concurred.

BOSANQUET, J., was absent in the Court of *Chancery*.

Rule discharged.

BARNETT v. GLOSSOP.

ASSUMPSIT to recover the price of a dramatic piece, in three acts, called *Victorine, or I'll sleep on it*, for which the defendant, the proprietor of the *Victoria* theatre, verbally agreed to give the plaintiff 15*l*. The plea was *non assumpsit*.

At the trial of the case, before the sheriff, a verdict was found for the plaintiff. On the last day of *Hilary* Term, *Thomas* obtained a rule calling upon the plaintiff to shew cause why the verdict should not be set aside, and a non-suit entered, on the ground that the agreement ought, under the 3 & 4 *Will.* 4, c. 15, and the 8 *Anne*, c. 19, to have been in writing.

On moving for the rule, on the last day of term, the trial having taken place on the day immediately previous, *Thomas* stated that he had not had time to obtain the sheriff's notes of the trial, but they should be forthcoming, with an affidavit of verification, when cause was shewn; and the Court, learning that he had been the counsel at the trial, agreed to hear the motion on his statement (a).

On a motion for a rule *nisi* to set aside the verdict found on a trial before the sheriff on a writ of trial, the Court, under special circumstances, will not require the production of the sheriff's notes, if the motion be made by counsel engaged at the trial.

If a good cause of action at common law appear in the declaration, the defendant must, under the Pleading Rules of *H. T. 4 W. 4*, plead any statutable illegality in the contract on which it is founded in answer.

Semble, that the general issue, with power to give the special matter in evidence, is abolished in all cases whatever, except where specially allowed by statute.

(a) *Johnson v. Wells*, ante, Vol. 2, p. 352.

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Dowling shewed cause against the rule.—The objection taken at the trial, on which a nonsuit was now sought to be entered, was not available on the present pleadings, as the plea of *non assumpsit* only was put on the record. Till answered upon that point, it would be sufficient to refer the Court to the rules of *H. T. 4 Will. 4*, where, under the head of Pleadings in Particular Actions, it was ordered, that, in every species of *assumpsit*, all matters that shew the transaction to be either void or voidable in point of law, shall be specially pleaded (*a*).

Thomas, contrà.—The plaintiff not having complied with the statutable provisions which require the assignment of the copyright to be in writing, he cannot recover; and that the assignment must be in writing, is clear from *8 Anne*, c. 19, s. 1, and *3 & 4 Will. 4*, c. 15, s. 2. *Power v. Walker* (*b*), *Cumberland v. Planché* (*c*), *Latour v. Bland* (*d*). If the plaintiff's claim was out of the statute, he had no cause of action, for copyright was the creature of the statute law.

Dowling cited *Millar v. Taylor* (*e*), to shew that, by the common law, authors had a right of action against those who printed and published their works without authority.

TINDAL, C. J.—I think that, under the new rules of pleading, the answer to the action now endeavoured to be set up should have been put on the record. The declaration is for a dramatic piece bargained and sold by the plaintiff to the defendant. The plea in answer is *non assumpsit*, and the defendant's counsel says, that, by the acts of *8 Anne* and *3 & 4 Will. 4*, there can be no good sale of dramatic property

(*a*) Ante, Vol. 2, p. 323.

(*b*) 3 Mau. & Sel. 7; S. C. 4 Camp. 8.

(*c*) 1 Ad. & Ellis, 580.

(*d*) 2 Starkie, 382.

(*e*) 4 Burr. 2417.

unless the assignment be in writing. The plea only denies the contract ; but a contract is proved, and if it be void in law, the defendant ought to have pleaded its illegality, under *Reg. Gen. H. T. 4 Will. 4.*

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PARK, J.—Much of the difficulty in such cases as the present has arisen from still calling the plea of *non assumpsit* the general issue, which it was under the old rules, but which it is not since the new rules have limited its effect. The object of the Judges who framed the *Reg. Gen. H. T. 4 W. 4.* was to prevent parties being taken by surprise by an unexpected defence being set up. It is unfortunate that the defence now set up was not pleaded; for, had it been, no Judge would have sent the cause to be tried before the sheriff.

GASLER, J.—I am of the same opinion. The cases cited by the defendant's counsel do not apply; for he has not placed himself in a situation upon the record to enable him to take advantage of them.

BOSANQUET, J.—I am also in favour of discharging the rule; and I should be sorry if the Court felt itself obliged to decide otherwise, for there can be no doubt that the great object of this part of the rules was to cause all legal defences to be put upon the record. The exception to that rule is to be found in the provision of the statute, which precludes the Judges from making any rule, declaring that the defence shall be specially pleaded where by statute the general issue is expressly given. In other cases the general issue is entirely at an end. In this case, the declaration shews a good cause of action; and, if the plaintiff be deprived of it by 8 *Anne* or 3 & 4 *Will. 4.*, that fact ought to have been pleaded.

Rule discharged.

1835.

ROLFE v. BROWN.

Where, in the service of a notice of declaration, the probabilities are that it has come to the hands of the defendant, and the latter does not deny that it had come to his knowledge, the Court will not set aside the service.

IN this case judgment had been signed for want of a plea. A rule *nisi* was obtained to set aside the judgment for irregularity in the service of the notice of declaration.

On shewing cause, it was sworn by the clerk of the plaintiff's attorney, that he went to *Haverhill*, the presumed residence of the defendant, and asked where *Henry Brown* (the defendant) lived. The party of whom he made the inquiry pointed to the house of *William Brown*, a baker, and father of the defendant, saying that he lived there. The clerk thereupon went to the house of *William Brown*, and asked if *Henry Brown* was at home, to which a female servant answered, "No, he is not." The clerk then left the notice, desiring the servant to give it to *Henry Brown* when he came home. *Henry Brown* in fact lived at *Church Croft, Haverhill*, in a cottage, the furniture of which belonged to his father; but he was in the daily habit of going to his father's house, to assist him in his business of a baker. In the affidavits filed by the father and son, on the application for the rule to set aside the judgment, the former swore that he never told his son of the notice having been left for him, and the latter that he was not informed of its having been left at his father's, and that he never saw it.

On cause being shewn,

The Court said that the language of the affidavits was by no means sufficiently clear to explain away the suspicious circumstances connected with the case. The answer of the female servant implied that the defendant did live with his father, and the defendant did not venture to swear that he did not know of the notice of declaration. All the circumstances were in favour of its having reached him by some means.

Rule discharged.

1835.

DEFRIES v. DAVIES.

THIS was an action of slander brought against the defendant two years ago, when he was about fifteen years of age. A verdict was found for the plaintiff, with 40*l.* damages, costs 70*l.*; and the defendant was taken in execution for the 110*l.* Being unable to pay, he a short time ago applied to the Insolvent Court to be discharged under the Insolvent Debtors' Act; but that Court would not discharge him, because being a minor he could not assign, as required by the Insolvent Act, the 7 G. 4, c. 57, s. 11.

The Court will not discharge an infant defendant in an action of slander, from execution for damages and costs, although the Insolvent Court has refused to relieve him, because on account of his infancy he was unable to make the assignment of property required by the 7 Geo. 4, c. 57.

Talfourd, Serjt., on behalf of the defendant, obtained a rule calling upon the plaintiff to shew cause why the defendant should not be discharged, citing *Ex parte Deacon* (a).

Hoggins shewed cause.

Per Curiam.—This question must be decided as if the Insolvent Debtors' Act had not passed at all. The application is to relieve a party from satisfying a judgment obtained against him for slander in the only mode he has of satisfying it. Cases have occurred of husband and wife being jointly taken in execution, where the wife has had separate property, which she has been willing to give up; and something like the satisfaction which the law requires having been thus obtained, the Court has not been unwilling to relieve the wife. But it would be opening a door to unlimited abuses, if an infant might be guilty of slander or trespass, without being liable to satisfy in his person what he could not in his purse.

Rule discharged (b).

(a) 5 B. & Al. 759.

(b) *Coram* TINDAL, C. J., PARK, J., GASELEE, J., and BOSANQUET, J.

1835.

POTTS v. SPARROW.

Under the pleading rules of *H. T. 4 W. 4*, the illegality of work and labour done cannot be given in evidence under the plea of *non assumpsit*, but must be pleaded, although the illegality be not inferential, but essential.

ASSUMPSIT on an attorney's bill, consisting principally of charges for preparing an agreement, and afterwards, in pursuance of that agreement, bringing the action of *Stanley v. Jones*, in furtherance of another agreement, which was held void for champerty, reported in the seventh volume of *Mr. Bingham's Reports* (a). Plea—*Non assumpsit*. A verdict was found for the plaintiff, with leave to the defendant to move to enter a nonsuit. A rule calling upon the plaintiff to shew cause why the verdict for the plaintiff should not be set aside, and a nonsuit entered, having been obtained on the ground that the agreement drawn by the plaintiff was illegal, and the action brought in pursuance of it consequently illegal also, the whole transaction amounting to maintenance.

Comyn now shewed cause.—No case has occurred in which it has been determined that an attorney shall not recover his costs, on the ground that the agreement he drew was illegal. A previous objection, however, might be taken, which the defendant could not overcome. He had pleaded *non assumpsit*, and under the rules of *H. T. 4 W. 4*, that plea only put in issue the business done, and the contract between the parties. Any collateral matter which was to have the effect of depriving the plaintiff of his right of action must be pleaded. If, therefore, the agreement prepared by the plaintiff for the defendant was an illegal agreement, it ought to have been pleaded, and the objection cannot now be taken. In *Wallace v. The Duke of Portland* (b), the subject of maintenance was very fully gone into; and a case of *Pearson v. Hughes* was cited from *Freeman's Reports*, in which it was held, that the

(a) Page 369.

(b) 3 Ves. 494.

illegality of a bond, on which an action was brought, ought to have been pleaded. Looking to this case and to the new rules, it was clear that the illegality of the plaintiff's labour ought to have been pleaded.

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SPARROW.

Talfourd, Serjt. and Dowling, contra.—The plaintiff must have known that he was acting illegally, for he was retained, not by the plaintiff in the former suit, but by a total stranger, to whose illegal acts of maintenance he made himself a party. His was not a slip in the course of regular business, or a step of inferential illegality, but an illegal engagement from the beginning to the end. He did no work which the Court could hear stated as the subject of an action. Suppose the case of one highwayman bringing an action against another for his share of booty, claiming it on an account stated, would the Court feel itself precluded by the new rules from doing substantial justice as soon as the facts appeared although the illegality might not have been pleaded. Maintenance did not involve the same moral guilt, but it was indictable as a misdemeanour. The illegality of a transaction might only appear by the evidence; but would the Court feel itself compelled by the new rules to give effect to an illegal and wicked transaction, because the defendant had not pleaded its wickedness?

TINDAL, C. J.—Arguments such as the defendant's counsel have now used might be applied to the case of usury. Usury is illegal, but a defendant must put himself in a situation to avail himself of the objection by pleading it.

PARKE, J., GASELLE, J., and VAUGHAN, J., concurred.

Rule discharged.

1835.

DENNETT v. PASS.

Where a rule of Court directs costs to be paid to the party or his attorney, a demand not made by the attorney who had conducted the cause in *London*, but by the attorney in the country, who employed him, is sufficient.

TADDY, Serjt., shewed cause against a rule obtained by *Atcherley*, Serjt., to set aside an attachment issued for the nonpayment of costs, pursuant to the Prothonotary's *allocatur*. The ground on which the rule had been obtained was, that the demand for costs had not been made by the attorney in the cause. The rule of Court for the payment of the costs directed them to be paid to the party or his attorney. The person who had made the demand in this cause was not Mr. *Taylor*, the attorney in *London*, who had had the management of the cause, but Mr. *Wagstaffe*, the attorney in the country, whose cause it really was, and who had employed *Taylor* as his agent. It was contended on the opposite side, that *Taylor*, the agent, ought to have gone down to *Warwick* to make the demand, as the attorney in the cause. It was true he had conducted the cause in *London*, but it was as an agent; and the opposite side had, in the course of the proceedings, treated *Wagstaffe* as the attorney in the cause, and shewed that they knew perfectly well *Taylor* was only an agent. Under these circumstances, there could be no doubt, that the demand by *Wagstaffe* was quite sufficient to support the attachment.

Atcherley, *contra*, contended, that the attachment was clearly irregular, as the demand ought to have been made by the party or his attorney on the record, Mr. *Taylor*. He cited *Hartley v. Barlow* (a), to shew that a demand by a clerk was insufficient.

TINDAL, C. J.—The rule authorizes the party or “his attorney” to demand the money. Rules are very fre-

(a) 1 Chitty, 229.

quently drawn up for the money to be paid to the party, his attorney, or agent; but here, the word "agent" is not used. The question is then, who is designated by the word "attorney," *Taylor* or *Wagstaffe*? Every one conversant with the practice prevailing in the conduct of country suits must be aware, that *Taylor* is the agent, and *Wagstaffe* the attorney, and he has been so styled by the parties on both sides. With respect to the case in *Chitty*, there is good reason for not allowing the demand of a clerk to be sufficient, for he may be changed at any time, and ask for payment of costs after he has been dismissed; but the attorney cannot be changed without all parties in the suit being made aware of it.

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PASS.

PARK, J.—I concur in what has been said by the Lord Chief Justice. In the case of *Ex parte Fostescue (a)*, an attachment was moved for on account of the non-delivery of a bond pursuant to a rule of Court, directing it to be delivered to the plaintiff, "his attorney or agent." The demand was made by a clerk of the plaintiff's attorney, and that was held insufficient, the clerk filling none of the characters mentioned in the rule. When, in rules of this kind, the words "attorney or agent" are used, the latter word signifies the attorney employed in *London* by the attorney in the country.

GASELEE, J., and BOSANQUET, J., concurred.

Rule discharged.

(a) Ante, Vol. 2, p. 448.

1835.

HISKETT v. BIDDLE.

The Court refused to grant a rule, calling upon the defendant in replevin to find security for costs, although it was sworn, that neither the defendant nor the broker were able to pay them, and the defendant had taken the benefit of the Insolvent Act.

C. JONES moved for a rule, calling upon the defendant in replevin to shew cause why he should not give security for costs. The defendant mortgaged the property in 1830, and gave his consent to the mortgagee's receiving the future rents. The tenants, accordingly, attorned to him. In 1831, the plaintiff took one of the houses, and paid his rent to the mortgagee. In 1834, the mortgagor applied for and received the benefit of the Insolvent Act. After his discharge in *March* this year, he levied a distress upon the plaintiff for rent due at the previous quarter-day. Just as the plaintiff was ready to proceed to trial in the County Court, it was removed here by *re. fa. lo.* Under these circumstances, and the plaintiff swearing that both the landlord and the broker were in such distressed circumstances as to be unable to pay the costs—

Per Curiam—The plaintiff being able to stop his proceedings, if he does not think it worth his while to proceed, we do not see how we can grant this rule. If the defendant lived out of the jurisdiction of the Court we might interfere, but we cannot merely on account of his poverty.

C. Jones took nothing by his motion (a).

(a) See *Doyle v. Anderson*, ante, Vol. 2, p. 596.

CUNLIFFE v. WHITEHEAD.

On an application by the defendant for a commission to

examine witnesses abroad, the Court refused to make it a part of the rule to call upon the plaintiff to produce a bill of exchange in his possession at the time of executing the commission.

W. H. WATSON moved for a rule, calling upon the plaintiff to shew cause, why a commission should not issue,

to examine witnesses at *Boulogne*, and why he should not be compelled to produce certain bills of exchange at the examination. The difficulty in the case is this: If the witness who is abroad were here, the defendant would be entitled to put the bill of exchange into his hand, and cross-examine him upon it, and he will not be entitled to shew the witness abroad a copy, unless he make every effort to obtain the original.

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Per Curiam.—We cannot order a plaintiff to send his documents abroad, for the application might be made on a question of title, and the plaintiff might be compelled, on such a principle, to send his title deeds to *Australia*. You must give him notice, and take other steps to attain your object.

Rule refused as to the bill of exchange, but
granted as to the commission.

PASMORE v. WILKINSON.

THE defendant, an infirm woman of eighty years of age, was arrested on mesne process on the 14th *February* by the late sheriff of *Northampton*; but it being the opinion of a medical man that it would endanger her life to remove her to gaol, he made a special return of the facts, and kept her in custody till he went out of office. He then transferred her to the present sheriff, who took on himself the writ, and the liability to bring in the body. A rule having been obtained requiring him to bring in the body,

Semble, that where one sheriff has made a special return to a writ of *capias*, the Court will not compel his successor to make another, the circumstances remaining unaltered.

Adams, Serjt., shewed cause.—He produced the affidavit of the physician who had seen the defendant the day she was arrested, and on the 28th of *April*,

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 {
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 v.
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after this rule was obtained, and who swore that her removal to a place of confinement would be attended with danger to her life.

Butt, in support of the rule.—Supposing what is stated to be a sufficient excuse for the sheriff, the proper course would be to make the rule absolute, and for the sheriff to make what return he pleases. We should then have a remedy against him either by action for a false return, or, if it be insufficient, shall be able to set it aside. The late sheriff has discharged himself, but we have no remedy against the present sheriff till he has made a return of some kind.

Per Curiam.—The sheriff can make no farther return than has been made, and he cannot bring in the body as you call upon him to do. If you can shew ground for it you can have an attachment; but you had better now take a common appearance, go on, and if the defendant has goods, take them.

Butt acceded to the suggestion.

Rule discharged, the defendant being at liberty to enter a common appearance.

Ex parte SWIFT, in the case of MATTHEW, v. SWIFT.

An attorney, not having had his name enrolled in the alphabetical book kept at the Prothonotary's Office, pursuant to 37 Geo. 3, c. 90, s. 27, will not be allowed to enter it *nunc pro tunc* after an action for penalties has been commenced.

ROBINSON moved for a rule to enter the name of an attorney in the book at the Prothonotary's Office *nunc pro tunc*. In the *King's Bench* it was not considered the

A party suing for penalties for the violation of an act of Parliament will not have the discretion of the Court exercised in his favour, if the action be merely within the letter of the act, and not its spirit.

attorney's duty to see his name enrolled in that book, pursuant to the 37 Geo. 3, c. 90, s. 27: it was left to the officer of the Court. But in this Court it was considered the attorney's business to see his name enrolled in the alphabetical list. *Swift*, not having done that, made the present application to protect himself from the penalties imposed by the act. A similar application was made and acceded to in *Ex parte Fry (a)*. There was certainly a difference between that and the present case, for here, an action had been commenced for the penalties; but the attorney was regularly admitted at the time, and the enrolment was a mere record of the fact, which the Court could amend. *Mellish v. Richardson (b)*.

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SWIFT.

Per Curiam (c).—We have no authority to grant the application now that the rights of third parties would be affected. An action has been brought for the penalties allowed by the law; and we cannot deprive the party who has sued for them of his vested right. The most familiar instance of the interference of the Courts, where the rights of third parties may by possibility be affected, is, that of entering up judgment against executors, and then it is always made a condition that the judgment shall not interfere with intervening payments.

Robinson took nothing by his motion.

The party suing for the penalties afterwards had occasion to apply to the Court for leave to amend his declaration; but the Court said, that, not considering his action to be brought in the spirit of the act, although it might be within its letter, they would not exercise their discretion in his favour.

(a) Ante, p. 338.

(b) 7 B. & C. 819.

(c) *Tindal*, C. J., *Gaselee*, J.,
Vaughan, J., *Bosunquet*, J.

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WATSON v. MASCALL.

Rule 93 of 1 *Reg. Gen., H. T. 2 Will. 4*, gives the attorney a lien on a judgment obtained by him for his costs as between attorney and client.

RULE 93 of 1 *Reg. Gen. H. T. 2 Will. 4* directs, that "no set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs, in the particular suit against which the set-off is sought." (a) A question upon the construction of this rule arose in the following manner. Besides the present there was a cross action of *Mascall v. Watson*. A verdict for 200*l.* having been found for the plaintiff in the present action, both actions were referred to a barrister, with an agreement that the costs should abide the event. The arbitrator decided in favour of the plaintiff in the action of *Mascall v. Watson*, giving him 400*l.* damages. It was admitted, that, in consequence, *Mascall* had become entitled to have paid over to him the 200*l.* he had paid into Court under the first verdict against him, subject to the lien of *Cox*, the attorney of *Watson*, who had obtained that verdict. But the question was, whether *Cox's* lien extended to costs as between attorney and client, or were limited to costs as between party and party. The latter costs were obtained two terms previously, and a rule *nisi* having been granted to pay the remainder of the 200*l.* out of Court to *Mascall*,

Humfrey now shewed cause against the rule, and contended that the true interpretation of 1 *Reg. Gen., H. T. 2 Will. 4*, s. 93, gave the attorney a lien for costs as between attorney and client. No question had yet arisen on the construction of this part of the rule; but it was clearly intended to protect the attorney in the particular suit, and nothing would be more unjust than to prevent him having recourse to the fruits of a judgment he had obtained for his client. He quoted the judgment of *Best, C. J.*, in *Jenkins v. Biddulph* (b).

(a) Ante, vol. 1, p. 196.

(b) 12 Moo. 390; 4 Bing. 160.

Goulburn, Serjt., and *Hayes*, *contra*, contended that the costs between party and party were all the attorney could reasonably claim. The ultimately successful party ought not to be bound by a liability which he did not assume. The client of Mr. *Cox* might authorize him to retain a particular counsel at a large fee, which he would be liable to him for the repayment of; but ought an adverse party to pay that fee? They cited *Sinclair v. Eldred* (a).

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TINDAL, C. J.—No case has before arisen on the construction of this part of rule 93 of *H. T. 2 Will. 4*, nor was one likely to arise, except by the attorney's client becoming insolvent. [His Lordship here read the rule]. The question now raised upon the language of this rule is, whether the attorney is only to have a right of lien for his costs as between attorney and client, or for costs taxed as between party and party? To solve this question, we must consider two propositions: *first*, what the lien possessed by the attorney was before the framing of this rule, and *second*, how he could maintain it. Now, although there is no express authority stated for it, nothing can be more certain than that the attorney had a lien against his own client for the whole demand arising out of his labour in the cause; subject, undoubtedly, to reduction by taxation as between attorney and client. It is not merely for conducting suits at law, but for other work, that an attorney may have a lien against his client. He may have a lien against him for preparing deeds, and may refuse to give them up till his claim be satisfied. So in the case of judgments; an attorney hitherto, as between his client and himself, has had a right to take his costs out of a judgment obtained by his client. So far was the principle of this rule carried, that in one case it was held, an

(a) 4 Taunt. 7.

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attorney might retain money that came into his hands, for the amount of his bill against his client. In another case it was even held, that he might stop his client's money *in transitu*, if he could lay hold of it. All, however, we have to consider now is, the attorney's lien upon a judgment. If his lien has hitherto been such as I have described it, what effect has this rule had upon it? To say that it means the attorney is only to have a lien upon the judgment for costs as between party and party, would be to prejudice his right; and I am unable to give any other interpretation to the rule, than that he is entitled to the whole amount of his costs as between attorney and client. I think Mr. Cox is entitled to have so much of the remainder of the 200*l.* as on taxation will give him his costs as between attorney and client.

PARK, J., GASELEE, J., and BOSANQUET, J., were of the same opinion.

Rule, accordingly.

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ORAM v. SHELDON.

This Court will not allow the sheriff applying to be relieved under the Interpleader Act his costs, where the claimant does not appear. Nor will the plaintiff be allowed his costs, except in the event of extremely improper conduct in the parties.

THIS was an application by the sheriff under the Interpleader Act. The sheriff had served the execution creditor, and a claimant who had given notice not to sell, with the rule. The claimant did not appear.

Hodges appeared for the execution creditor, and contended, that besides having the money paid over to him, he should have his costs. The claim set up was by the defendant's son, and was now acknowledged to be groundless.

T. D. Watley appeared for the sheriff, and cited

Philby v. Ikey (a), to shew that the sheriff had been allowed his costs where the claimant did not appear. The costs were quite in the discretion of the Court.

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TINDAL, C. J.—The sheriff is extremely well off in being indemnified at so cheap rate as he is, and cannot have his costs. The Court of *Exchequer* have thought one way, but we think another. With respect to the plaintiff, he will not be allowed costs, except in case of extremely improper conduct in the opposite party.

The rule was made absolute to pay the money over to the plaintiff, but without allowing any costs.

(a) *Ante*, Vol. 2, p. 222.

SMITH v. BIRD and Another.

THIS was an action to recover back a sum of money alleged to have been paid by the plaintiff, for freight, twice. A summons was served by the plaintiff's attorney upon the defendant, to appear before a Judge at chambers, to admit the signature, &c. to the following documents:—

The Court has not jurisdiction, under r. 20 of *H. T.*, 4 *Will.* 4, to order the admission of documents; but if a Judge at chambers desires parties coming before him under that rule to go before the Court, they will be heard, but the Court will pronounce no judgment, leaving

Description of Documents, &c.

1. Letter from the defendant to Mr. *Cyrus Jay*, the plaintiff's attorney, (sent by post).—*Birmingham*, November 16th, 1832.

that to be done by the Judge at chambers.

On the plaintiff paying the defendant the expenses of examining a judgment and other documents abroad, an order was made for the defendant to pay the expense of proving them at the trial (such proof being satisfactory to the Judge, and so certified by him), whatever might be the result of the case, if after such examination the defendant did not admit them.

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2. Letter from the defendants to Mr. *Cyrus Jay*, (sent by post).—*Birmingham, December 20th, 1832.*

3. An account headed Mr. *Samuel Smith* Dr. to *G. R. Bird & Sons*, canal carriers and wharfingers. Its amount, 21*l.* 11*s.* 5*d.*

4. The receipts of *Van Picyenbrock*, at the side thereof.

5. Letter written by the defendants, *G. R. Bird & Sons*, to the plaintiff, and sent by post.—*Birmingham, August 4th, 1831.*

6. Letter written by *George Williamson* for *Thomas Worthington*, addressed to the plaintiff, and sent by post.—*Manchester, October 2nd, 1832.*

7. And also the invoice contained therein.

8. Letter from *James Goodman* of *Northampton*, to the plaintiff, and sent by post.—*August 23.*

9. And also the invoice therein.

10. Letter written by *James Goodman*, of *Northampton*, to the plaintiff, and sent by post.—*December 6, 1832.*

11. Copy of the defendant's bill of the receipt of *Van Picyenbrock*, and the certifying thereof by *Van Kelen*, notary public at *Brussels*.—*November 13, 1832.*

12. A declaration in *French*, signed by *T. Defrenne*, dated *Brussels, April 12, 1833.*

13. Letter from *Van Picyenbrock* to Mr. *Defrenne*, dated *Brussels, February 21st, 1833.*

14. Minutes of the judgment of the tribunal of First Instance sitting at *Brussels*, in the matter of *Samuel Smith* (the now plaintiff) a merchant there, and *Jean Baptiste Van Picyenbrock*, in *French*, and a translation thereof in *English*.

15. Copy of a letter written by *James Guest & Sons* of *Brussels*, dated *Birmingham, May 27, 1833*, to M. *Van Picyenbrock* of *Brussels*, registered in that city, and made an attested copy by *Van Der Kelen*.

16. The receipt of *Van Picyenbrock* to the plaintiffs

for 128 florins, on account of *G. R. Bird & Sons*, the defendants to this action.—*Brussels*, 18 April, 1832.”

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GASELEE, J., intimated at chambers, that he should prefer the argument being heard by the Court.

Bompas, Serjt., now appeared to support the application, and *Goulburn*, Serjt., to oppose it in the first instance.

The Court doubted at first whether it could hear the case argued, the rule 20 *Reg. Gen.*, *H. T. 4 Will. 4 (a)*, only giving jurisdiction to a Judge at chambers; but finally decided upon hearing the argument as if stated to them by the learned Judge, before whom the point was raised at chambers, not delivering judgment, but communicating their opinion to the learned Judge, and leaving him afterwards to make his order at chambers.

Bompas, Serjt., then contended that there was no document in this list which the defendant ought not to admit. It contained three classes of papers: first, letters, the handwriting of which the plaintiff desired to save the expense of proving; secondly, the receipts of the defendant's agent; and, thirdly, the copy of a foreign judgment. The objection to the admission of the last was, that, being a foreign judgment, the defendant was not bound to admit it. But 20 *Reg. Gen.*, *H. T. 4 Will. 4* embraces *all* documents, its terms being “any written or printed document.” The alternative, if these admissions were not made, was that a commission must be sent abroad at an enormous expense, while the cause of action did not exceed 30*l*.

TINDAL, C. J.—Surely the plaintiff is not to be put to the expense of sending to *Brussels* to examine these documents. It is not like the case of a judgment in this Court,

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which a man in the country can easily have examined by an agent in *London*.

Bompas, Serjt., said there was not the same facility in obtaining the examination of a *French* record as there was of one in this Court. The latter could be made at an expense of five shillings. Examined copies of probates and of judgments in the Ecclesiastical Courts were made as well as judgments of this Court. Why should an examined copy of a foreign judgment be excluded from the benefit of a rule made to save expense, when to prove such a judgment otherwise must be attended with greater expense than proving any other? With respect to the signatures to the different papers at *Brussels*, the defendant was perfectly well acquainted with them, and should be made to admit them just in the same way as if they were at *Bath*. There was no suggestion of forgery in the case.

Goulburn, Serjt., *contrà*.—If this application were granted, it would amount to trying the cause in the first instance. The rule was only intended to include the admission of such documents as the party on inspection must be supposed to have some certain knowledge of, and the admission of which he could only captiously resist. Now, the documents in the foreign Court were not documents in cases in which the defendants were parties. Why should they pay the costs for not admitting documents respecting which they knew nothing?

BOSANQUET, J.—But, if the rule had not been made, would not the plaintiff, if he succeeded in the cause, have been entitled to costs of proving these documents by bringing witnesses from *Brussels* to this country. The rule, to save the defendant this expense, says, that the

plaintiff shall first give him the option of examining and admitting them.

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Goulburn, Serjt.—The rule required the application to be reasonable; and a requisition to admit a foreign judgment was not reasonable.

TINDAL, C. J.—If application be shortly made to the learned Judge at chambers, we shall have suggested to him our opinion.

The following orders were afterwards drawn up at chambers:—

“ Upon hearing the attornies or agents on both sides, and by consent, I order that the defendants do hereby admit upon the trial of this cause the documents, numbers 3, 5, and 15, mentioned in the notice hereunto annexed; and I further order (it appearing unto me unreasonable that the said defendants should admit the documents, numbers 6, 7, 8, 9, and 10, also mentioned in the said notice hereunto annexed), that the costs of proving the said documents upon the trial of the said cause shall abide the event of the said cause; and I further order that the said defendants shall have one fortnight's time to inspect at *Brussels* the documents numbers 4, 11, 12, 13, 14, and 16, also mentioned in the said notice hereunto annexed, and that the plaintiff do pay the costs occasioned by such inspection, to be taxed by the prothonotary; and I further order, that, in the event of the said defendants not admitting the said documents after such inspection, the costs of proving the said documents, provided the same shall be proved upon the trial of the said cause to the satisfaction of the Judge, to be certified by his indorsement, shall be paid by the said defendants, whatever may be the result

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of the said cause. Dated the fifth day of *May*, one thousand eight hundred and thirty-five.

"S. GASELEE."

"By consent of the agents for the defendants I order that the said defendants do hereby admit upon the trial of this cause the several letters, numbered 1, 2, and 5, and the account numbered 3, mentioned in the notice hereunto annexed. Dated the twenty-third day of *April*, one thousand eight hundred and thirty-five.

"S. GASELEE."

HUNT v. BARCLAY.

Where the plaintiff will not be materially prejudiced by the delay, the Court will, under certain circumstances, grant the defendant a year's time to plead.

THIS was an action against the captain of a *South Sea* whaler, now absent on a whaling expedition. On the application of his attornies, Mr. Justice *Vaughan*, at chambers, granted him twelve months' time to plead. The plaintiff obtained a rule *nisi* to rescind Mr. Justice *Vaughan's* order, partly on the ground that the defendant's attornies were, from certain circumstances arising out of a former trial, fully acquainted with the facts of the case, and partly on the ground that the plaintiff had witnesses who were about to leave this country, and would not return by the time the trial would come on, if so long a time were allowed the defendant to plead.

Talfourd, Serjt., for the plaintiff.

Bompas, Serjt., for the defendant.

Per Curiam (a).—The time which has been allowed for pleading is unusually long; but, as a commission cannot

(a) *Tindal*, C. J., *Park*, J., *Gaselee*, J., and *Bosanquet*, J.

be sent after a ship in the *South Seas*, and as the plaintiff cannot be injured by the delay, we will not set aside the order made at chambers. We think that if the defendant were obliged, he would be able to put a complete defence upon the record; and, if we saw that the plaintiff would be materially prejudiced by the order that has been made, we would set it aside: but, as we do not think he will be materially prejudiced, the rule must be discharged, on the defendant consenting to the plaintiff's examining his witnesses, who are going abroad, upon interrogatories, or *vidé voce*, as may now be done before the prothonotary.

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Rule accordingly.

COURT OF EXCHEQUER,

Easter Term,

IN THE FIFTH YEAR OF THE REIGN OF WILLIAM IV.

11. See Baldwin v. Barker. 21. 11. 1. P. 16.
12. Hodgson v. May. 7. 11. 4.

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SHRIMPTON v. CARTER.

11. An affidavit intitled *G. Shrimpton v. Wm. Carter* the elder, sued as *Wm. Carter*, the cause being *G. Shrimpton v. Wm. Carter*, was rejected as being badly intitled.

Payment of the debt and costs after a peremptory undertaking given, is a ground for having it discharged; but the plaintiff cannot be compelled to enter a *stet processus*.

SHEE shewed cause against a rule which had been obtained by *Chilton* for entering a *stet processus*, or for discharging the peremptory undertaking given by the plaintiff, on the ground that the action had since been settled by payment of the debt and costs to the plaintiff.

ALDERSON, B.—I cannot compel the plaintiff to enter a *stet processus*—it is optional with him whether he will do so or not.

Shee.—The attorney has a right to go on with the action for his costs: the action has been settled behind the back of the attorney.

ALDERSON, B.—I think the plaintiff had a right to accept the debt and costs; and that, as the debt has been paid, the peremptory undertaking ought to be discharged.

Rule absolute for the peremptory undertaking to be discharged.

Chilton objected to an affidavit intended to have been used on shewing cause, that it was improperly intitled

"*Geo. Shrimpton v. Wm. Carter the elder, sued as Wm. Carter*," the action being by *George Shrimpton v. William Carter*.

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Shee contended, that there was no material variance; but—

ALDERSON, B., rejected the affidavit.

PITT v. EVANS.

THE plaintiff applied in person to be let out of custody, under the provisions of the 48 *Geo. 3*, c. 123, he having been in prison more than twelve months, upon an attachment out of Chancery, for nonpayment of costs under 20*l*. He contended, that an attachment for nonpayment of costs was equivalent to a judgment.

An application under the 48 *Geo. 3*, c. 123, must be made to the Court out of which the process issues: That act does not apply to attachments.

LORD ABINGER, C. B.—The act provides, that the application to be discharged out of execution must be made to the Court where the judgment was obtained; and, therefore, even supposing that an attachment out of Chancery is equivalent to a judgment, this Court cannot entertain the motion, as the attachment issued from another Court.

PARKE, B.—It has been held that the statute does not apply to attachments (a).

BOLLAND and ALDERSON, Bs., concurred.

Rule refused

(a) *Rex v. Hubbard*, 10 East, 408, cited 2 B. & Ald. 61.

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LENNEY *v.* POULTER.

Notice of trial was given in a cause (ordered to be tried before the sheriff) for a Court day in *Easter Term*, the issue having been joined in the previous vacation; but the plaintiff did not proceed to trial according to his notice:—*Held*, that a motion for a judgment as in case of a nonsuit, made in the same term, was too early.

ROBINSON shewed cause against a rule which had been obtained by *Bazett*, for judgment as in case of a nonsuit. Issue was joined on the 10th of *April*. The cause had been ordered to be tried before the sheriff, and notice of trial had been given for the 23rd of *April*, at the Sheriff's Court. It was contended, that, as the default happened within the term, it was too early in the term to move for judgment as in case of a nonsuit; and he relied upon *Begbie v. Grenville* (a), where it was held, that such a motion could not be made in the same term in which the default had happened; and, according to the old practice, such a motion could never be made till the term following that in which the default was made.

Bazett, in support of the rule, contended that he was entitled to move for judgment according to the words of the act (b), unless the plaintiff proceeded according to the course and practice of the Court. Issue was joined before the term began; notice was given in the term, but the defendant did not take his cause down to be tried according to his notice, and he had therefore made a default. In *Howell v. Powlett* (c), where the plaintiff gave notice of trial a term earlier than the practice of the Court required, and omitted to try according to his notice, it was held, that, as the plaintiff had chosen to expedite his proceedings more than he was bound to do, he could not afterwards recede, and the defendant was entitled to move for judgment as in case of a nonsuit, though, if the plaintiff had not given such an early notice, the defendant could not have moved. He also cited *Butter-*

(a) *Ante*, Vol. 2, p. 238.

(b) 14 Geo. 2, c. 17.

(c) 1 Moo. & Scott, 355; 8 Bing. 272.

worth v. Crabtree (a). Formerly, the plaintiff could not be forced to take more than one step in a term, but now it is unnecessary to rule the plaintiff to enter the issue. There is no case where a notice of trial has been given in term. As there are four court days in the Secondaries' Office in *London*, the plaintiff may think proper to give as many different notices of trial, and the defendant may be thereby very much harassed. The practice of this Court appears to be different from the other Courts; for by a rule of *Easter Term*, 1824 (b), it was ordered "that no rule for judgment as in case of a nonsuit be granted in the next term after issue joined, unless it appear on the affidavit on which the motion is founded, that the plaintiff had given notice of trial and had neglected to proceed to trial pursuant to such notice." That rule impliedly admits, that where notice of trial has been given, judgment may be moved for in the term next after issue joined; and therefore, according to the terms of that rule, this motion is not too early.

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PARKE, B.—According to the old practice, where a notice of trial was given in term, defendant could not have moved for judgment till the next term. The rule is clearly laid down in *Tidd's Practice* (c), that if notice of trial is given for a sitting in or after term, the defendant may move for judgment as in case of a nonsuit the next term, being the term after that in which issue ought to have been entered (d). This motion, therefore, appears to me to be too early.

(a) Ante, 184.

(b) 1 M'Clel. 708.

(c) 9th ed. p. 764.

(d) With respect to this Court, the rule laid down in *Tidd*, (9th ed.) p. 765, is this:—"In the Exchequer, the defendant might formerly have

moved for judgment as in case of a nonsuit the next term after that in which issue was joined, if joined early enough to enable the plaintiff to give notice of trial for the sitting in or after the preceding term, a plaintiff in that court being

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ALDERSON, B.—There is no hardship upon the defendant, for he gets his costs occasioned by the notice.

Lord ABINGER, C.B.—It is better to adhere to the established practice. It has already been expressly decided in *Begbie v. Grenville*, that this motion is too early in the same term; and therefore I think this rule must be discharged.

Rule discharged.

LANE v. ISAACS.

An affidavit in support of a rule for setting aside a judgment signed by the plaintiff for want of a plea alleged that the defendant had merits, and a good cause of defence to the action:—*Held* insufficient. The affidavit must express that the defendant hath a good defence to the action on the merits thereof.

SWANN shewed cause against a rule which had been obtained by *Humfrey* for setting aside an interlocutory judgment for irregularity. He objected that the affidavit of merits was not sufficiently positive. It was in this form, "And this deponent saith that he hath merits and good cause of defence to this action."

Humfrey, in support of the rule, said, that, in the Bail Court, a similar affidavit had been held to be sufficient.

Lord ABINGER, C.B.—The rule is perfectly well known

in all cases bound to proceed to trial at the next sitting or assizes after issue joined, provided there was time for giving notice of trial. But now, by a late rule of court, no rule for judgment as in case of a nonsuit shall be granted in the next term after issue joined, unless it appear on the face of the affidavit on which the motion is founded, that the plaintiff had given notice of trial, and had neg-

lected to proceed to trial." It appears, therefore, that in the Exchequer the plaintiff had not the same time for proceeding to trial as he had in the other Courts; and as the vacation is now considered for most purposes the same as the term, the time for moving for judgment ought, it should seem, to be regulated with reference to the alteration made in the time for proceeding in the action.

that a judgment cannot be set aside for irregularity, without a positive affidavit of merits.

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PARKE, B.—The affidavit must be express that the defendant hath a good defence to the action on the merits thereof.

Time was allowed to get a proper affidavit upon terms.

WAINRIGHT v. BLAND.

ROBINSON applied for a *mandamus* under the 1 *Will.* 4, c. 22, s. 1 (a), for the purpose of examining witnesses in *Scotland*.

A *mandamus* cannot be issued into *Scotland* under the 1 *Will.* 4, c. 22, s. 1, for the examination of witnesses there; but a commission may be issued for that purpose under the 4th section.

(a) This section, after reciting that great difficulties and delays are often experienced, and sometimes a failure of justice takes place in actions depending in Courts of law, by reason of the want of a competent power and authority in the said Courts to order and enforce the examination of witnesses when the same may be required before the trial of a cause; and that, by the 13 Geo. 3, intituled "An Act for the establishing certain regulations for the better management of the affairs of the East India Company as well in India as in Europe," certain powers are given and provisions made for the examinations of witnesses in India in the cases therein mentioned; and that it is expedient to extend such

powers and provisions, enacts, "That all and every the powers, authorities, provisions, and matters contained in the said recited Act relating to the examinations of witnesses in *India* shall be and the same are hereby extended to all colonies, islands, plantations, and places under the dominion of his Majesty in foreign parts, and to the Judges of the several Courts therein, and to all actions depending in any of his Majesty's Courts of Law at Westminster, in what place or country soever the cause of action may have arisen, and whether the same may have arisen within the jurisdiction of the Court to the Judges whereof the writ or commission may be directed, or elsewhere, when it shall appear that the examination of

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Per Curiam.—*Scotland* cannot be considered as in “foreign parts” within that section. You must proceed by commission under the 4th section (b).

witnesses under a writ of commission issued in pursuance of the authority hereby given will be necessary or conducive to the due administration of justice in the matter wherein such writ shall be applied for.” See 2 Dowl. Stat. p. 42. The 13 Geo. 3, c. 63, s. 44, gives the Court at Westminster power to issue mandamuses for the ex-

amination of witnesses in India when actions are brought in the Courts here for causes of action arising in India.

(b) This section empowers the Courts at Westminster to order a commission to issue for the examination of witnesses on oath at any place out of the jurisdiction by interrogatories.

MARDEN'S BAIL.

HEATON moved to justify bail.

Where bail was put in in this form—“*Ely, by Cole,*” the former not being an attorney of this Court, though the latter was, the proceedings were held to be informal, but time was given to amend.

Butt objected that the attorney in whose name the bail was put in and notice given, was not an attorney of this Court.

Heaton.—The proceedings are indorsed “*Ely, by Cole:*” the latter is an attorney of this Court; *Ely* is also an attorney, but not of this Court. An attorney may practise here in the name of an attorney of the Court; and therefore it appears that *Ely* is acting in *Cole's* name, and with his authority. It was held in *Goodman v. Cover* (a), that an attorney of another Court may practise in this Court in the name of an attorney of this Court.

ALDERSON, B (b).—The name of *Cole* should have been used as the attorney in the case.

Time was given till *Monday* to amend.

(a) Ante, p. 424.

(b) Sitting alone.

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THOMAS v. WILLIAMS.

JOHN JERVIS moved for a rule calling upon the defendant to shew cause why a *scire facias* should not issue to revive a judgment obtained in *Wales*.

Upon a motion to revive a judgment by *scire facias* the validity of the judgment cannot be impeached for the purpose of opposing that motion, but a separate application must be made to set aside the judgment.

Richards shewed cause upon affidavits that the suit was commenced in 1816, and that a declaration was then delivered, but no appearance was entered; and that the plaintiff's attorney caused an appearance to be entered some years afterwards, and signed judgment. He contended, that the attorney had no right so to do; that the act of 11 *Geo. 4* & 1 *Will. 4*, c. 70, having abolished and destroyed the power of the Courts of Great Sessions in *Wales*, the plaintiff's attorney, whatever he might have done before that act came into operation, was not authorized, at a distance of many years afterwards, to manufacture a record for the purpose of taking proceedings upon it; and that, under these circumstances, the Court would not allow the writ to issue, as there was virtually no judgment.

John Jervis, in support of the rule, contended that the defendant was not at liberty to impeach the record; that, as there was in fact a judgment, however irregularly it might have been obtained, the defendant had no right upon the present occasion to oppose this rule; that the rule was moved for and drawn up on reading the transcript and record of the judgment.

Lord ABINGER, C. B.—This is a judgment purporting to be signed in 1816. The defendant cannot impeach that judgment except on an application to the Court to set it aside. At present, the objections made to it are merely *ex parte*, and the plaintiff has had no opportunity of answering them. The objections urged against this rule may be made the ground of separate objections.

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PARKE, B.—The judgment must be considered regular until it has been set aside. There should have been a cross motion.

Rule absolute.

COLDWELL v. BLAKE.

Upon a writ against several, the plaintiff may declare against one only; but if he declares against any other defendant afterwards, he will be irregular.

CRESSWELL moved to set aside the declaration against the defendant, for irregularity. The only process against the defendant was against two, of whom the defendant was one; and it was contended that the declaration ought to correspond with the writ; and rule 1 of *M. T.* 3 *W.* 4 was referred to, which directs that every writ of summons, *capias*, and detainer, shall contain the names of all the defendants, if more than one, in the action, and shall not contain the name or names of any defendant or defendants in more actions than one. It was argued upon the construction of that rule, that it was irregular to declare against one upon process against several.

LORD ABINGER, C. B.—Your objection at present is too early. You will be in time when the plaintiff has declared against the other.

PARKE, B.—It has been so decided over and over again. It is the regular practice.

Rule refused.

See *Knowles v. Johnson*, ante, Vol. 2, p. 653.

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WRIGHT v. GARDINER.

WHITE moved to enlarge a rule for judgment as in case of a nonsuit, on the ground that the defendant had been unable to serve it: and also that service of the rule by sticking it up in the office might be deemed good service, the plaintiff's attorney having gone away from his last place of residence and it being unknown where he was gone.

Service of a rule by sticking it up in the office will not be allowed upon an affidavit that the attorney's residence is unknown, unless it is also sworn that the party's residence is unknown.

ALDERSON, B.—You must also have an affidavit that you do not know where the plaintiff lives.

Githers v. Light. 21. L.L.R. 258.

THOMPSON v. CARTER.

A RULE had been obtained by *Mahon* for setting aside an order of Mr. Justice *Bosanquet*, which allowed the plaintiff's attorney the costs of taxation of his bill, though more than a sixth was taken off.

It is too late to rescind a Judge's order allowing to the plaintiff's attorney the costs of taxing the costs on the back of a writ, for which more than a sixth was taken off, after the order has been made a rule of Court, and an attachment obtained upon it.

Platt shewed cause, and contended, that this motion came too late, the order having been made on the 3rd of *April*, since which it had been made a rule of Court in the present term, and upon that a demand of costs had been made, and an attachment issued. On the other side, it was contended, that the Court had been always liberal in granting relief to the client where an advantage had been improperly taken by an attorney; that the Court allowed bills to be taxed even after they were paid; and the act of Parliament (a) was express, that the attorney should pay the costs if more than a sixth was taken off. He also referred to the rules of *H. T. 2 Will. 4*, div. ii. which ordered

(a) 2 Geo. 2, c. 23, s. 23.

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that the attorney should pay the costs of taxation if more than a sixth was disallowed of the costs charged on the back of the writ, even though they had been paid. Here, out of 1*l.* 10*s.* charged upon the writ, no less than nine shillings were taken off, and the amount of costs now charged is 4*l.* 6*s.* The order must have been obtained surreptitiously.

LORD ABINGER, C. B.—I think the application is too late.

PARKE, B.—The defendant has allowed the other side to go on and incur expense, and he is therefore now too late.

Rule discharged with costs.

HARLE v. WILSON.

The issue in a country cause, ordered to be tried before the sheriff, was joined on the 9th of *August*, but the plaintiff did not give notice of trial; a motion for judgment as in case of a nonsuit, in the *Hilary* term following, was held to be premature.

GEORGE showed cause against a rule which had been obtained by *Knowles* for judgment as in case of a nonsuit. From the affidavits it appeared, that issue was joined on *August* the 9th, 1834. The venue was laid in *Yorkshire*. The order had been obtained and served for the trial of the cause before the sheriff of *Yorkshire* on the 18th of *August*, but no notice of trial was given. It was sworn that the sheriff of *Yorkshire* held courts for the trial of causes, under the Writ of Trial Act, as often as reasonable notice was given to him for that purpose. He contended, that this motion, which was made in *Hilary* Term last, was made too early; and he referred to *Horwood v. Roberts* (a), in the *King's Bench* Bail Court, where it was held, that all proceedings preparatory to the trial of the issue before the

(a) Ante, Vol. 2, p. 534.

sheriff must be governed by the course and practice of the Court above. These two terms had elapsed without notice of trial before the motion was made. As the issue in this case was not joined till the vacation, this motion ought not to have been made till after two terms had passed, or one assize; and the rule must, therefore, be discharged.

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WILSON.

Knowles, in support of the rule, relied upon *Mullins v. Bishop* (a), where a rule was obtained, calling upon the plaintiff to shew cause why he should not proceed to the trial of the cause within a fortnight, or have judgment as in case of a nonsuit against him. There the order for the trial before the sheriff was on the 29th of *April*, and two court days had passed; and in *Maddeley v. Batty* (b), this Court held, that the plaintiff was bound to proceed to try his issue according to the course and practice of the sheriff's court.

ALDERSON, B.—*Butterworth v. Crabtree* (c) is an express decision against the present motion. There issue was joined in a country cause before the sheriff in *June*, and no notice of trial was given; and it was held that a motion for judgment as in case of a nonsuit, in *Michaelmas* Term, was too early, though two court days had passed: this motion is, therefore, premature.

LORD ABINGER, C. B.—In *Maddeley v. Batty*, notice of trial had been given. There is no rule that where the trial has been ordered to be before the sheriff, the plaintiff must go to trial at the next court; but the case of *Butterworth v. Crabtree*, in this Court, is an express decision upon the point, and therefore the rule must be discharged.

(a) Ante, Vol. 2, p. 557.

(b) Ante, p. 205.

(c) Ante, p. 184.

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PARKE, B.—If you had moved this term, it would have done. I am not disposed to give any facility to these motions, which are very often more mischievous than otherwise.

Rule discharged, with costs.

WILLIAMS v. EDWARDS.

When a rule *nisi* for judgment as in case of a nonsuit was discharged on a peremptory undertaking to try at the next assizes, and afterwards an order for trial at the sheriff's court was obtained, and the plaintiff neglected to try at the next sheriff's court:—*Held* that the defendant was entitled to a rule absolute for judgment as in case of a nonsuit.

RAWLINSON moved for a rule absolute in the first instance for judgment as in case of a nonsuit. A rule *nisi* for judgment as in case of a nonsuit had been obtained last *Michaelmas* Term, but was discharged on a peremptory undertaking given by the plaintiff to try at the next *Assize* Assizes; but, on the 6th of *December*, a Judge's order was obtained for trying the cause before the sheriff, and for relieving the plaintiff from the peremptory undertaking to try at the assizes. The affidavit stated, that more than one sheriff's court had been held, but the plaintiff had not proceeded to trial. The question was, whether the rule was to be absolute in the first instance, or only *nisi*.

The Court, considering that the effect of the order was merely a substitution of the sheriff's court for the assizes, held, that the plaintiff was bound by the peremptory undertaking, and that the rule should be absolute.

Rule absolute.

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EVANS and Wife v. MILLARD.

JOHN EVANS moved for an attachment for noncompliance with a judge's order, which had been made a rule of Court, and which was in these terms:—"I order that upon payment or tender to the plaintiffs, their attorney, or agent, on or before the 26th day of *March* instant, of 1000*l.*, the debt for which this action is brought, and 78*l.* 12*s.*, the interest thereon, up to the said 26th day of *March* instant, and also the costs to be taxed by the Master, all further proceedings in this cause be stayed, and that the plaintiffs shall on such tender or payment deliver up to the defendant's attorney the title deeds and other securities held by him for payment of the said debt and costs for which this action is brought." Upon this order costs had been taxed, and the Master's allocatur was—"for costs, 14*l.* 5*s.*" The affidavit stated, that, on the 26th instant, the defendant's attorney tendered to Mr. *Williams*, the agent for the plaintiffs' attorney, 1092*l.* 17*s.*, being the above debt, with the interest and costs up to the 26th instant; and that he then demanded the title deeds; that the agent accepted the tender; that the money was then lodged at a banker's; and that notice was given to Mr. *Williams*. The affidavit further stated that the defendant had been always ready to pay the money to the plaintiffs, their attorney, or agent, but that the deeds had not been delivered.

A judge's order directed, that, on payment or tender of the debt and costs to the plaintiffs, their attorney or agent, the plaintiffs should deliver up to the defendant certain deeds held by the plaintiffs as a security. An attachment was moved for on an affidavit that the money was tendered to the plaintiffs' attorney's agent, and the deeds demanded, but that they had not been delivered:—*Held*, that the affidavit was insufficient, and that notice should have been given to the plaintiffs, and a demand made personally of them.

ALDERSON, B.—You must give notice to the plaintiffs that the money has been tendered to the agent, and demand the deeds personally of the plaintiffs.

Rule refused.

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second trial, acknowledged that he had no ground of defence to the action, and that the first verdict was right upon the merits, and that therefore, in point of justice, he ought to pay the costs of the trial. That case, it was argued, was directly in point, and warranted the Master, under the circumstances of the present case, in giving the plaintiff the costs of the inquiry. According to the old practice, the plaintiff would have been entitled to the costs of both inquiries; and, until the late rule (a), a defendant succeeding on a second trial was entitled to the costs of both: that rule made an alteration in the practice of this Court, in order that the costs of the first trial should not be allowed to the successful party, even if he succeeded on the second, unless it was so ordered in the rule. That rule, however, does not apply to the present case.

R. V. Richards in support of the rule.—The case cited was decided on the ground that the defendant by giving a cognovit admitted that the action was rightly brought in the first instance; here, on the contrary, though the defendant admitted his liability to part of the plaintiff's demand, and therefore suffered judgment to go against him by default, denied his liability as to the remainder of the plaintiff's demand. The jury thought proper to find a verdict contrary to the summing up, and which finding this Court afterwards set aside, on the ground that there was no evidence to warrant it as to that sum: then the defendant, calculating the expense of a new inquiry, finds it would be more advantageous to pay that sum at once than to incur further costs, which must necessarily fall upon him. Where a new trial or inquiry becomes necessary in consequence of the mistake of a Judge or jury, it is unreasonable that either party should have to bear the whole costs

(a) 1 Reg. Gen. H. T. 2 W. 4, s. 64.

occasioned by the mistake. The latest case upon the subject, *Seeley v. Powers* (a), where the Judge having discharged the jury from giving a verdict, upon the ground of their not being able to agree, it was decided that the party ultimately successful was not entitled to the costs of the first attempt at a trial. *Jackson v. Hallam* was reconsidered in the case of *Gray v. Cox* (b), where the plaintiff having obtained a verdict, the Court granted a new trial without mentioning the costs, and the plaintiff then discontinued the action; and it was held that the defendant was not entitled to the costs of the trial. In that case, it was held by the Court that if the cause had gone to a second trial, and the defendant had succeeded, he could not have obtained the costs of the former trial; and they said it was difficult to find a reason why the defendant should be in a better situation because the plaintiff did not choose to have the cause tried a second time; and they said, that *Jackson v. Hallam* proceeded on the ground that the plaintiff who gained the verdict on the first trial was ultimately successful. In the present case, therefore, if the plaintiff had gone to a second inquiry, he would not have got the costs of the first; neither would he have been successful upon the second inquiry, because he had no evidence, in the opinion of the Court, to warrant the finding of the jury as to part of the demand, which in fact was the only part in dispute; for the defendant, in suffering judgment by default, always admitted himself to be liable to pay something: there is no reason, therefore, why the plaintiff should be in a better situation as to costs, now he has

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(a) Ante, p. 72.

(b) 8 Dowl. & Ryl. 220; 5 B. & C. 458. So in *Elvin v. Drummond*, 12 Moore, 523; 4 Bing. 415, the plaintiff having succeeded in setting aside a nonsuit, the defendant gave a cognovit for one shilling

damages, and such costs as the prothonotary should think fit. The prothonotary, on taxing costs, refused to allow the plaintiff the costs of the trial; and the Court, upon an application by the plaintiff, declined to interfere.

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been paid the whole of what he claimed, than he would have been in if he had gone to a second inquiry, and recovered only a portion of his claim.

LORD ABINGER, C. B.—I think that, under the circumstances, the defendant ought not to be charged with the costs of the inquiry.

PARKE, B.—In this case there would have been no doubt if it were not for the circumstance of the defendant's having paid the full amount claimed; for if there had been a second inquiry, the plaintiff would not have been entitled to the costs of the first inquiry. *Jackson v. Hallam* was considered as an exception to the general rule; and where there is a general rule, there ought to be as few exceptions to it as possible. I think that there is a distinction between that case and the present, on the ground taken by Mr. *Richards*, and that the defendant ought not to be charged with the costs of the first inquiry.

BOLLAND and GURNEY, Barons, concurred.

Rule absolute.

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An attorney is not justified in proceeding with an action after it has been settled between the parties themselves, though it is known that costs have been incurred, and that the plaintiff himself is not in a condition to pay them; it must be shewn affirmatively, that the settlement was come to for the purpose of cheating the attorney.

R. V. RICHARDS obtained a rule *nisi*, calling on the plaintiff to shew cause why all further proceedings should not be stayed, and why the plaintiff's attorney should not pay the costs of all proceedings since the 24th of *March*, when he had notice that the action had been settled, and that the plaintiff had agreed to pay his own costs.

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Miller shewed cause.—It appeared from the affidavits, that the action was brought to recover 14*l.* 15*s.* 2*d.*; that the plaintiff's attorney had offered to settle the action by abating 6*l.* if the balance with the costs was paid, but this offer was declined by the defendant's attorney; and that the defendant, without the knowledge of the plaintiff's attorney, had afterwards settled the action with the plaintiff himself, who was in low circumstances, and insolvent, and about to go to *America*. The plaintiff's attorney had therefore proceeded with the action for the purpose of recovering his costs. It was now contended, that he was justified in so doing, inasmuch as the defendant's settling the action with the plaintiff, without any intimation given to his attorney, and when it was known that costs had been incurred, was a fraud upon the plaintiff's attorney.

PARKE, B.—There is no occasion to cite authorities, because the principle applicable to cases of this nature is perfectly clear. It is quite competent to parties to settle actions behind the backs of the attorneys, for it is the client's action, and not the attorney's. It must be shewn affirmatively that the settlement was effected with the view of cheating the attorney of his costs. Nothing would be got by letting the case go to trial, for the settlement after action brought may be pleaded in bar to the further maintenance of the action, and would be a good answer to it.

The rest of the Court concurred.

Rule absolute (a).

(a) See *Young v. Redhead*, ante, Vol. 2, p. 119.,

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LACEY v. FORRESTER.

Upon a plea of no consideration to an action on a promissory note, to which the plaintiff replied that there was a consideration, the *onus* of proving that there was no consideration lies upon the defendant.

Where the jury find a verdict in opposition to the evidence of a witness, and the credibility of the witness is left to the jury, the Court will not grant a new trial, though there was nothing to impeach the credit of the witness.

KELLY moved for a new trial in this action, which was in *assumpsit* on a promissory note for 10*l*. The defendant had pleaded that the note was given without any consideration; to which the plaintiff replied, that there was a consideration. At the trial before the secondary, the plaintiff obtained a verdict; no evidence was given by the plaintiff, except the production of the note. It was objected that the plaintiff ought to prove a consideration, as the affirmative of the issue lay upon him. For the defence, a witness was called, and the secondary told the jury that the evidence he gave amounted to a defence, if they believed the witness. It was now contended, that there was no evidence to support the verdict for the plaintiff, and there was express evidence for the defendant, and that there was nothing elicited which could shake the testimony of the defendant's witness, nor any pretence for disbelieving him.

Lord ABINGER, C. B.—It has been several times held, that, upon pleadings like the present, the onus of proving the want of consideration lies upon the defendant. There was a case in this Court last term, where it was held that a plea of this sort was too general, and ought to have been more specific (*a*); for the rule of law which existed previously to the new rules was not intended to be altered, and before these pleas were introduced the defendant was bound to prove that no value was given. With respect to the witness who was called for the defendant, as it appears that the Secondary distinctly left it to the jury upon the credit of the witness, we cannot grant a new trial, unless we are prepared to say that in every case

(*a*) *Easton v. Pratchett*, ante, p. 473.

where the jury disbelieve a witness we are bound to grant a new trial.

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ALDERSON, B.—We have no evidence of the manner in which the witness gave his evidence; and with respect to the plea, it is clear, that if it had been drawn in conformity with the new rules, the issue would have been upon the defendant, and he ought not to be in a better condition because he has pleaded an informal plea.

The other Barons concurred.

Rule refused.

PHIPPS v. INGRAM.

THESIGER applied for a rule under the 3 & 4 Will. 4, c. 42, s. 39 (a), calling upon the defendant to shew cause why the authority of the arbitrator in this case should not be revoked. This was an action brought to recover the price of a phaeton, which had been built under a written contract, and, at the trial, the cause was by order of *Nisi Prius* referred to *Stocken*, a coachmaker. The defence was, that the phaeton was not built according to the agreement. At the first meeting before the arbitrator, the plaintiff brought with him seven witnesses, and requested that they might be examined; but the arbitrator, after inspecting the phaeton, said it was no use examining witnesses; and ultimately made his award for the defendant,

The refusal of an arbitrator to examine witnesses is sufficient misconduct on his part to induce the Court to set aside his award, though he may think that he has sufficient evidence without them.

The authority of an arbitrator cannot be revoked after he has made his award.

(a) By which it is enacted, that the power of an arbitrator appointed by rule of Court, or Judge's order, or order of *Nisi Prius*, in any action, or in pursuance of any submission to reference, con-

taining an agreement, that such submission may be made a rule of Court, shall not be revocable by any party to the reference, without leave of the Court or a Judge.

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after hearing the defendant's witnesses, and without hearing the plaintiff's witnesses. It was also alleged in the affidavits, that the arbitrator was living at the defendant's house, and other circumstances were stated, for the purpose of shewing that the arbitrator had unduly favoured the defendant. The phaeton had been delivered to the defendant.

Lord ABINGER, C. B.—We cannot revoke the authority of the arbitrator: he has exercised his authority, and made an award. You may have a rule for setting aside the award.

A rule *nisi* having been granted—

Platt shewed cause.—This rule was moved for on the ground of misconduct of the arbitrator: there is nothing in the affidavits to shew misconduct on his part. The phaeton was to be made according to the agreement; and the arbitrator, who was himself a coach-builder, could see by inspection whether it was properly built or not, and he has, in fact, found that the phaeton was made according to the agreement.

Lord ABINGER, C. B.—There is no imputation upon Mr. *Stocken's* character; but I think he was bound to examine the plaintiff's witnesses.

PARKE, B.—There is no misconduct, in the bad sense of the word. The rule must be absolute.

Rule absolute.

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HAMBER v. COOPER.

HUMFREY moved to discharge the defendant out of custody, on the ground that he had been twice arrested for the same cause of action. The circumstances were these:—He was originally arrested for a debt of 70*l.* for fees due to the plaintiff as a messenger, and special bail was put in; an arrangement was afterwards come to between the parties, and ultimately the action was settled, part of the agreement being, that the defendant should give a bill for 30*l.* drawn by a third person and accepted by himself, which was accordingly given, and the action was then discontinued: but when the new bill arrived at maturity, it was dishonoured, and the plaintiff then arrested both the drawer and acceptor. *Taylor v. Wastneys* (a) was relied on as in point: there a defendant being arrested for 25*l.*, lay in gaol till he was superseded. The plaintiff meeting him afterwards, got a note from him for 20*l.*, and brought a fresh action upon it, and held him to bail. But the Court discharged him upon common bail, deeming it only as a farther security, and as not extinguishing the former cause of action, which might be declared upon still. So, in *Wilson v. Hamer* (b), where a defendant (being arrested) obtained his discharge by giving the plaintiff security for the debt, but the security proving very inadequate, the plaintiff (without restoring it) again arrested the defendant for the same cause, the Court ordered the bail-bond to be cancelled with costs, no fraud being imputed to the defendant. In *Cantellow v. Trueman* (c), a defendant in custody was discharged upon the terms of giving new bills, which he neglected to do; and the plaintiff having arrested him again, the second arrest was held regular,

A defendant having been arrested for a debt, and having put in special bail, settled the action by giving a bill of exchange for 30*l.* drawn by a third person, and accepted by himself, and the plaintiff then discontinued the action. The bill being dishonoured, the plaintiff again arrested the defendant on the bill:—*Held*, that the second arrest was regular.

(a) 2 Stra. 1218.

(c) Ante, Vol. 2, p. 2.

(b) 1 Moore & Scott, 120.

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because there had been a breach of faith on the part of the defendant; but where there has been no fraud on the part of the defendant, the rule has been not to allow a second arrest. Here the defendant has been twice arrested for a debt of 30*l*.

LORD ABINGER, C. B.—This is a new security of a third person, which I always understood could be pleaded as accord and satisfaction to an action on the original cause of action, though a bill of the party's own could not be so: the original debt may be considered as extinguished, and therefore the plaintiff arrests again as upon a new cause of action.

PARKE, B.—The only doubt in my mind has arisen from the case in *Strange*. If the new bill was accepted as accord and satisfaction, no doubt it would be an extinguishment of the original debt, though it does not appear to me that it must be necessarily accord and satisfaction because it has the name of a third person; but it is, at all events, a new security; an account was stated, and this bill was given, and there is no reason why the plaintiff should not be at liberty to arrest for the amount. In the last two cases cited, the arrest was for the original cause of action.

The other Barons concurred.

Rule refused.

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HANNAH v. WYMAN.

HUMFREY moved to set aside the copy of the writ of summons, on the ground that the writ was not properly indorsed. The writ was indorsed thus:—"This writ was issued by *J. L.*, of &c., attorney for the said *plaintiff*." He contended, that this was irregular, because in the form given by the act the word "plaintiff" is not used, but "*A. B.*"; shewing that the plaintiff's name was intended to be inserted. In support of the objection, he cited *Petersdorff's Practice* (a), and a case decided in the *Common Pleas*, there cited, in which that was held to be a good objection, and where the writ was set aside.

The Court refused to set aside the copy of a writ, because the word "plaintiff" was used in the indorsement on the back of the writ instead of the plaintiff's name.

Notice to stay proceedings in the *Exchequer* is a two days' notice.

John Jervis shewed cause in the first instance, and objected, that the motion was too late; the general rule being, that such an objection as this must be made within four days, whereas the writ was served on the 6th, and the motion was not made till the 12th. *Secondly*, he contended, that the objection was not sustainable; for in the form of the *capias* given by the act, the word "plaintiff" is used instead of "*A. B.*," shewing that it was considered to be immaterial which was used; and that if there happened to be a great many defendants in the action, as all must be included in the same writ, it would be extremely inconvenient to have to repeat all their names several times over, as would be necessary according to this objection. He further contended, that the indorsement was no part of the writ; and therefore, even supposing that it was a variance, it was not material.

Humfrey in reply.—The motion is in time, for the writ was served on the 6th, at *Hertford*; and as the defendant's object was to stay proceedings, it was necessary to give

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two days notice in this Court for that purpose; that notice was given on the 8th for *Monday* the 11th, and instructions for the motion were given the same day. This writ deviates from the form given by the act, and is therefore irregular; and the plaintiff, having had notice of it, might have rectified it. It has been uniformly held by the Courts, that they will not inquire into the materiality of the alteration; as, by requiring a strict compliance with the act, discussions about the materiality of mistakes are avoided.

LORD ABINGER, C. B.—Upon principle, I certainly do not feel disposed to grant this motion, for it is calculated to occasion delay; and therefore, in the absence of any precise authority on the point, I think this rule must be discharged.

PARKE, B.—The defendant might certainly have made this motion earlier, for there was no occasion that he should give notice of motion, and that notice might have been given earlier; but I think this rule should be discharged upon the other ground. The Court has several times acted upon this distinction with reference to objections of this nature—that where there is an express enactment that a particular form shall be adopted, a deviation from that form, though apparently trivial, has been held to be fatal; but the same strictness has not been observed with respect to other objections, where there is no express enactment as to the form. The 1st section of the act expressly directs, that the writ of summons shall be in the form given by the act. The 12th section, which requires an indorsement, does not require that indorsement to be in a particular form, but merely directs, that the writ shall be indorsed with the name and place of abode of the attorney. Here the writ is properly indorsed with the name and place of abode of the attorney; and as no satisfactory

authority has been quoted that an indorsement like the present is bad, the rule must be discharged.

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BOLLAND, B.—The rule stated by my Brother *Parke* has been constantly acted upon at chambers, where amendments in the writ itself are never allowed to be made, but amendments of the indorsements are constantly allowed.

ALDERSON, B.—In one of the forms of indorsement for writs of summons as given in the schedule to the act, the word “plaintiff” is used instead of “A. B.,” which shews that the difference was not considered very material.

Rule discharged.

— *In Han v. Hyde. 20. L. J. Q. B. 185.*
Wentington v. Hannan. 27. L. J. Q. B. 25.
Lane v. Hyde. 27. L. J. Q. B. 75.

JACOBS v. JACOBS.

HUMFREY shewed cause against a rule which had been obtained by *Mansel*, calling on the plaintiff to shew cause why the defendant should not be discharged out of custody. From the affidavits on both sides, it appeared that the defendant was endeavouring to take the benefit of the Insolvent Act, but having been opposed by the plaintiff, that Court ordered him to be remanded, with an intimation that he might expect a severe sentence. The detaining creditor then withdrew, and the insolvent was in consequence let out of prison on *Saturday*, the 6th of *April*. At one o'clock on *Sunday* morning two police officers came to the defendant's house and took him into custody upon a charge of forgery, and conveyed him to a police office, where he remained till he was brought up before a magistrate at eleven o'clock on *Monday* morning. The hearing of the case was postponed until one o'clock, at the instance of the person who made the charge, when

A defendant who has been wrongfully arrested upon a *Sunday*, upon a charge of forgery, without any warrant, may be lawfully arrested upon civil process, as he is leaving the police office after he has been ordered by the magistrate to be discharged.

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the case was gone into, and the magistrate thinking there was no case made out against the defendant, discharged him. In the mean time, the prosecutor had informed the plaintiff of the circumstance, who issued a writ in this action, upon which the defendant was taken into custody as he was leaving the police office. The affidavits in support of the rule alleged, that the plaintiff was in collusion with the person who preferred that charge; that he was present at the hearing before the magistrate, and that the charge was falsely made, for the purpose of effecting an arrest in this action: all which, however, was positively denied by the affidavits in answer to the rule, which stated circumstances from which it might be inferred that the charge of forgery was not unfounded, and that the defendant's arrest, preparatory to taking the benefit of the Insolvent Act, was concerted and fictitious. It was now contended, that as any collusion on the part of the plaintiff was expressly denied, the rule must be discharged (*a*).

PARKE, B.—It has been expressly decided, that a defendant discharged from legal custody on a criminal charge is not privileged from arrest in a civil suit, on his way home (*b*).

Mansel, in support of the rule, contended, that even supposing it sufficiently appeared that there was no collusion, still, as the arrest upon the criminal charge was wrongful and unfounded, the subsequent arrest was also unlawful; and he relied upon *Barratt v. Price* (*c*), where it was

(*a*) See *Bartley v. Faber*, 2 B. & Ald. 743.

(*b*) See *Anon.* ante, Vol. 1, p. 157. There the defendant had been tried at the Old Bailey for felony, in embezzling a sum of money, but was acquitted and discharged; on his leaving the

Court, he was arrested upon a bailable writ, for the very money which formed the subject of the indictment, and it was held that that arrest was lawful. *Goodman v. London*, ante, Vol. 2, p. 504, S. P.

(*c*) Ante, Vol. 1, p. 725; 2 Moo. & Scott, 651; 9 Bing. 756, S. C.

held that, if the sheriff has arrested a defendant in one action illegally, he cannot afterwards detain him in another. So, in *Wells v. Gurney* (a), where, by the contrivance of the plaintiff's attorney, the defendant was arrested on a *Sunday* on a criminal process, for the purpose of effecting an arrest on civil process, and he was detained in custody until *Monday*, and then arrested on the civil process—the Court ordered him to be discharged out of custody. Here the criminal arrest was unlawful, because no warrant had been previously obtained.

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PARKE, B.—It can make no difference to the defendant whether the first arrest was unlawful or not. This case depends upon the question whether the plaintiff was privy to the arrest on a criminal charge; and I think it does not sufficiently appear that he was.

GURNEY, B.—*Barratt v. Price* proceeded on the ground that the sheriff had been guilty of a wrongful act in the first instance, and that, therefore, he could not justify the subsequent detainer. If the defendant was improperly arrested without a warrant, he has his remedy against the parties who caused it.

Rule absolute.

(a) 8 B. & C. 769. But in *Mac-kie v. Warren*, 2 Moo. & Payne, 279; 5 Bing. 176, the Court of C. P. refused to discharge a defendant from custody under a *ca. sa.*

on the ground that he had been before irregularly taken upon and discharged from criminal process at the instance of the plaintiff.

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tion was made by him until he was brought in custody to his attorney, who pointed out the mistake to him, and said, that if the officer insisted upon taking him, the bail-bond must be given in the name of *Cocken* sued as *Cocker*. For the defendant, the case of *Scandover v. Warne* (a) was cited, where the declaration averred, that the *latitat* commanded the sheriff to take one *Francis Jones* by the name of *John Jones*, and that the sheriff arrested *Francis Jones* by the name of *John Jones*, and that defendants became bound for the appearance of *Francis Jones* arrested by the name of *John Jones*; and Lord *Ellenborough* held, that the averment in the declaration was not supported by evidence of a *latitat* in the common form, commanding the sheriff to take *John Jones*, though the plaintiffs offered to prove that the defendant was the real debtor, and that the writ must speak for itself, and, though the acknowledgment might be evidence against *Jones* himself, it was immaterial on the issues raised. Upon the authority of this case, Mr. Baron *Alderson* nonsuited the plaintiff. A rule *nisi* for setting aside the nonsuit, and for entering a verdict for the plaintiff, having been obtained by *Barstow*—

Dowling shewed cause, and relied upon the case cited at *Nisi Prius* of *Scandover v. Warne*, as being precisely in point; and though there was evidence there that the real debtor was arrested, the plaintiff was nonsuited: so, he contended that here the issue was not proved, unless it could be said that a writ issued against a defendant by the name of *Cocker* was a good writ against him though his right name was *Cocken*.

LORD ABINGER, C. B.—It appears to the Court, that Lord *Ellenborough* was wrong in nonsuiting the plaintiff in that case, because, in point of fact, there was evi-

(a) 2 Campb. 269.

dence of a writ having issued against the defendant in that action by the name of *John Jones*: so here it was admitted that there was a writ against the defendant, though it had the name of *Cocker* instead of *Cocken*.

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PARKE, B.—The question on the pleadings was, whether there was a writ issued against the defendant by the name of *Cocker* instead of *Cocken*, as alleged in the declaration; that was clearly proved; and therefore, the issue being found in favour of the plaintiff, this rule must be absolute. If the defendant had demurred to the declaration, we are of opinion that it would have been bad; and it seems to us at present, that the declaration is now bad in arrest of judgment, and that the defendant should therefore have a rule for arresting the judgment.

A rule *nisi* for arresting the judgment having been granted—

Barstow shewed cause.—It is impossible to say upon this record which is the right name: all that appears is, that a writ issued against a man of the name of *Cocker*, and that he gave a bond by the name of *Cocken*. The plaintiff was therefore bound to sue by the name used in the bail-bond, and the defendant ought also to be bound by it. He contended, that it was too late now for the defendant to take the objection, the 32nd rule of *H. T. 2 Will. 4*, which was made in pursuance of the direction of the 11 *Geo. 4* & 1 *Will. 4*, c. 70, directs, that where the defendant is described in the process or affidavit to hold to bail by initials, or by a wrong name, or without a Christian name, the defendant shall not be discharged out of custody or the bail-bond be delivered up to be cancelled, on motion for that purpose, if it shall appear to the Court that due diligence has been used to obtain knowledge of the proper name. This rule was intended to take away an

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advantage which a defendant previously had; and all that it is necessary for the plaintiff to do is, to shew that he has used due diligence. Here, if the plaintiff had proceeded to judgment, it is clear that the defendant might have been taken in execution by the same name; and he cannot be in a better situation by giving a bail-bond, and so getting out of custody, and then breaking the condition of it by not appearing. It was decided in *Crawford v. Satchwell* (a), where the plaintiff brought trespass by the Christian name of *Archibald*, and the defendant justified under a *ca. sa.* issued against the plaintiff upon a judgment against *Arthur*, and averred that the plaintiff was the same person in this action who was sued by the name of *Arthur* in the former action, the Court, upon demurrer, held the plea to be good, the defendant having missed his time for taking advantage of the misnomer, which he should have done by pleading it in the first action. But in the case of a bond given in a wrong name, he must be sued in that wrong name, and the execution must follow the judgment. The late act of 3 & 4 Will. 4, c. 42, s. 11, takes away the right of a defendant to plead in abatement for a misnomer; and directs that in all cases in which a misnomer would, but for that act, have been by law pleadable in abatement in such actions, the defendant shall be at liberty to have the declaration amended at the cost of the plaintiff, by inserting the right name. That act was evidently intended to take away the right of a defendant to avail himself of a mere misnomer, where there was no doubt of his being the proper person. In *Callum v. Leeson* (b), the question came before the Court, whether since that act a defendant has a right to avail himself of a misnomer by motion; and though it became unnecessary to decide the question, Mr. Baron *Bayley* appears to have

(a) 2 Strange, 1218.

(b) Ante, Vol. 2, p. 381; 2 C. & M. 406, S. C.

been of opinion, that the act applied so as to prevent his doing so. By the old law, a defendant's right to avail himself of a misnomer, by moving to set aside the proceedings, was always regulated by his right to plead in abatement; and therefore, if he suffered the time for pleading in abatement to elapse, he could not afterwards avail himself of the objection: *Binfield v. Maxwell*(a); *Salter q. t. v. Sheargold*(b). Even the criminal law has been altered by taking away the right of a prisoner to plead a misnomer in abatement; the 7 Geo. 4, c. 64, s. 19, enabling the Court to amend the indictment, and proceed as if no such dilatory plea had been pleaded. If such a mistake, therefore, had occurred in an indictment, the defendant could not have availed himself of it, neither could he if he had remained in prison instead of coming out upon bail; and it was held in *Morgan v. Bridges*(c), that the sheriff may arrest a defendant by a name different from his own, though he would not be bound to do so, or be liable to an action for an escape for letting the defendant out of custody on such a writ. Here the allegation of the arrest was not material, and need not have been averred, according to *Hayly v. Fitzgerald*(d), and *Taylor v. Clowe*(e); and therefore issue could not have been taken upon it, as it would have been an immaterial issue. It is not disputed that the defendant was the person who was the real debtor, and against whom the writ issued. Which was the right name, and which the wrong name, does not appear on the record; it might be that the defendant had purposely assumed a false name: and therefore the Court will not arrest the judgment, upon the ground that *Cocken* was his right name, and not that by which he was sued.

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(a) 15 East, 159.

(b) 3 T. R. 572.

(c) 1 B. & Ald. 647.

(d) 1 Strange, 643.

(e) 1 B. & Ald. 223.

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Platt and Dowling in support of the rule.—It may be admitted that it was unnecessary to aver an arrest; but it is material that there should be proper process against the defendant. The 23rd Hen. 6, c. 9, s. 1, directs that the sheriff, and all other officers and ministers, shall let out of prison all manner of persons by them, or any of them, arrested or being in their custody, by force of any writ, bill, or warrant in any action personal, upon reasonable sureties of sufficient persons having sufficient in the county where such persons be so let to bail to keep their days in such place as such writs, bills, or warrants shall require. If the bail-bond had been given by the defendant by the name in the writ, he would have been estopped from taking any objection; but all that is admitted by the bond is, that he has been arrested by a wrong name. *Cole v. Hindson* (a) is expressly in point: that was an action of trespass for taking the plaintiff's goods. The defendant justified under a *distringas* against *Richard Cole*, and it was averred that the writ issued against the plaintiff, *Aquila Cole*, under the name of *Richard Cole*; upon demurrer, the plea was held bad; and Lord *Kenyon* said, the defendants were not justified in seizing the goods of *Aquila Cole* under a *distringas* against *Richard Cole*; and the averment in the plea, that *Aquila* and *Richard* were the same person, was not sufficient, as they had not averred that the plaintiff was known as well by one name as the other. So, in *Shadgate v. Clipson* (b) the same point was determined; Lord *Ellenborough* saying that process ought correctly to describe the party against whom it is issued; and that the arrest of one person cannot be justified under a writ sued out against another. *Rex v. Sheriff of Middlesex* (c) is to the same effect. The cases cited on the other side are distinguishable: those were applications to set aside proceedings for irregularity,

(a) 6 T. R. 224.

(b) 8 East, 238.

(c) 2 Chitty, R. 357.

which must always be made within a reasonable time. Upon this record, it must be taken that the defendant's name was *Cocken*: if an issue had been found for the plaintiff that the defendant was known as well by one name as the other, the writ would be in fact against him by either name. Unless this proposition can be supported to the full extent, that any man can be arrested on a writ, however different the name in it may be from his own, this declaration cannot be supported; and it is very material with respect to the consequences which may flow from such a doctrine: for it is distinctly laid down in *Foster (a)*, that if there be a mistake in the name of the person on whom process is to be executed, and the officer be killed, it will amount to no more than manslaughter in the person arrested.

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Lord ABINGER, C. B.—This is a question of very great importance both with regard to criminal and civil proceedings. A warrant is bad unless the name is in it, or such a *designatio personæ* as is not likely to lead to a mistake (*b*). If a defendant were to resist the sheriff upon a writ issued against him by a wrong name, and death were to ensue, the question would arise whether it was murder or manslaughter; I think it better that that question should not be raised. There is no doubt that, before the late Act of Parliament, this declaration would have been bad; and unless we can infer that the law was meant to be altered by the framers of that act, and that it was intended that a sheriff should be authorized to arrest a man by any name which happened to be in the writ, this declaration cannot be supported. It appears to me that the arrest was illegal. The rules of Court which have been cited cannot have altered the law, because the Court had no jurisdiction by the act under which those rules were framed to make alterations in the law.

(a) Fost. 312.

before the twelve Judges, cited in

(b) So decided in *Rex v. Hood*, Archbold's Cr. Pleading, by Jervis.

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PARKE, B.—I am entirely of the same opinion. This argument was directed for the purpose of considering the effect of the recent Act of Parliament, which takes away pleas in abatement. It is quite clear, that, before the late act, this bail-bond would have been void. The 11 *Geo.* 4 & 1 *Will.* 4 only enables the Courts to make rules to regulate the practice of the Court, and not to make alterations in the law. The 3 & 4 *Will.* 4 has adopted the enactments of the 7 & 8 *Geo.* 4 in civil proceedings: that act, however, does not take away entirely the consequences occasioned by a misnomer, but only directs that it shall not be pleadable in abatement: formerly, this suit could not have gone on, but now it can, subject to the party's right to bring an action. It would be too much to hold that the legislature had by that clause intended so great an alteration in the law, as that a man must submit to any process upon which he may happen to be arrested, though the names are totally different. It appears to me that he remained in the same situation that he did before the late act, except that he cannot avail himself of the objection by plea in abatement. The plaintiff might have got over the difficulty by averring that the defendant was known by one name as well as the other, if he could have supported such an averment by proof.

BOLLAND, B.—It appears to me that the late act had not abrogated or abolished the old law upon this subject; and, if so, there is nothing on the face of the pleadings to warrant the arrest.

ALDERSON, B.—The rule of *H. T.* was framed upon the supposition that the practice of the Courts was different with respect to the mode of taking advantage of a defect in the process or affidavit to hold to bail in not properly stating the name of the defendant; that rule was made with a view of assimilating the practice of all the Courts. According

to the old law, a person arrested by a wrong name was not bound to give a bail-bond, and the arrest was wrongful. It appears to me that the arrest is no more legal since the recent act than it was before, but the mode of taking advantage of it by a plea in abatement is taken away, so that it, in fact, reduces the writ of *capias* to a mere summons.

1835.
FINCH
v.
COCKEN.

Rule absolute for arresting the judgment.

EADES v. EVERATT and Another.

ERLE shewed cause against a rule which had been obtained by *Rogers*, calling on the defendants to shew cause why they should not pay to the plaintiff's attorney the sum of 40*l.* 6*s.*, on the ground that the Master had allowed that sum to be set off on the taxation of the defendant's attorney's costs, without prejudice to the plaintiff's attorney's lien, or why the Master should not review his taxation of the defendant's costs. From the affidavits it appeared, that two actions between the above parties, one an action on the case, and the other of trespass, were referred at the last *Spring Assizes*. The action on the case arose out of several distresses for rent, and was brought for irregularities in the course of those distresses. The arbitrator found for the plaintiff, with 100*l.* damages, upon eleven counts in the declaration, and he found for the defendant upon the other twelve counts. The Master, on the taxation, taxed the defendants' costs upon the issues found for them, at the sum of 40*l.* 6*s.*, which were deducted by him from the costs allocated to the plaintiff. This motion turned upon the construction of rule 74 of

In an action on the case, containing several counts in the declaration, some issues were found for the plaintiff, and some for the defendant:—*Held*, that the Master in taxing the costs was correct in deducting the costs of the defendant's issues from the plaintiff's costs, and that the lien of the plaintiff's attorney was only upon the balance coming to the plaintiff.

Held, also, that the expense of a witness called by the defendant, whose evidence was substantially directed towards the is-

ssues found for the defendant, was properly allowed to the defendant, although he gave some evidence upon the other issues.

1835.
EADES
v.
EVERATT.

H. T. 2 Will. 4, directing that no costs shall be taxed to the plaintiff on any counts or issues upon which he has not succeeded, and that the costs of all issues found for the defendant shall be deducted from the plaintiff's costs; and also upon rule 93 of *H. T. 2 Will. 4*, which directs, that no set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for the costs in the particular suit against which the set-off is sought; provided, nevertheless, that interlocutory costs in the same suit, awarded to the adverse party, may be deducted. It was contended, that, upon the construction of these rules, the Master was correct in setting off the costs without regard to the attorney's lien, so that the judgment might be entered for the balance; and *Howell v. Harding* (a), and the late case of *George v. Elston* (b), were cited. Another objection was, that the Master had allowed to the defendant the costs of a witness of the name of *Boyce*, who was called by the defendants, and whom the arbitrator certified to have been a material witness for the defendants, and that he had given evidence on certain of the counts on which the verdict was found for them, and also that he gave some general evidence on two of the counts, on which a verdict was found for the plaintiffs, ten shillings being allowed for subpoenaing him, and 9*l.* 12*s.* for his loss of time and travelling expenses.

Rogers, being called upon by the Court to support the rule, contended, upon the first point, that these costs were not interlocutory, and that the set-off ought not to have been allowed.

PARKE, B.—The question is, whether the attorney has a lien for any thing but the balance. The 74th rule is positive as to deducting the defendant's costs. Some is-

(a) 8 East, 362.

(b) Ante, p. 419.

sues being found for the plaintiff, and some for the defendant, the plaintiff cannot, under any circumstances, claim more than the balance, and therefore his attorney has no lien except upon the balance.

1835.

EADES
v.
EVERATT.

Rogers.—The second objection is, that the costs of the witness *Boyce* ought not to have been deducted from the plaintiff's costs, for his evidence was not entirely confined to the issues found for the defendant, and he relied on *Lardner v. Dick (a)*: in that case, some of the issues were found for the plaintiff and some for the defendant, and it was held that the defendant was not entitled to the costs of his witnesses, unless their testimony was confined solely to the issues found for him.

PARKE, B.—I think, looking fairly at the object for which this witness was brought forward, it cannot be said that the defendant is not entitled to have the costs allowed him. If the witness would not have been brought forward, except for the introduction of those counts in the declaration on which he succeeded, he was substantially a witness on those issues: merely asking questions upon other counts upon which he really was not brought forward, is hardly sufficient to warrant his being considered as a witness on the latter counts; but the Master reports, that not being able to satisfy himself upon the point, he required an affidavit, which was produced, that he was subpoenaed solely with the view to those counts on which the defendant succeeded.

ALDERSON, B.—The certificate of the arbitrator is merely that the witness gave some general evidence on two of the issues found for the plaintiff, but does not say that it was material.

(a) Ante, Vol. 2, p. 333.

1835.

EADES
v.
EVERATT.

Rogers.—There is another objection to the allowance which the Master has made for fees of counsel. He has allowed to the defendant a much larger proportion in respect of the fees and briefs than he ought to have done, and though 78 out of 94 items were struck off the defendant's costs, 1*l*. is charged against the plaintiff for taxation.

PARKE, B.—With respect to the briefs, the question is, to what issues the greater portion of the briefs really belonged. A very clear case must be made out before we would interfere on such an objection: and as to the costs of taxation, the Master had no power to charge either party. The rule must be discharged.

Rule discharged.

DOE *d.* MORGAN *v.* ROTHERHAM.

An application under the 1 Geo. 4, c. 87, that the defendant in ejectment should give security, may be made by one of several tenants in common, and it is not necessary that the attesting witness should depose to the execution of the lease, if it is sufficiently proved by other witnesses.

GEORGE had obtained a rule *nisi* under the 1 Geo. 4, c. 87, s. 1, calling upon the defendant to shew cause why he should not enter into a recognizance to pay the costs and damages to be recovered.

Busby shewed cause, and contended, first, that as the execution of the agreement under which the defendant held, is required by the act to be proved by affidavit, it ought to be proved by the best evidence, which was that of the attesting witness. Instead of which, the affidavit was made by other persons. Secondly, That the landlord was entitled only to an undivided third part. The notice to quit applied to all the premises, and the demand of possession was of the whole. The defendant, in fact,

held of three landlords, who were tenants in common. He contended, that the act was intended to apply only to those cases where the landlord was entitled to the entire possession.

1835.

DOE
d.
MORGAN
v.
ROTHERHAM.

The Court, however, overruled these objections, and made the rule absolute.

Rule absolute.

DOE d. SCHOVELL v. ROE.

WALLINGER moved for judgment against the casual ejector. The ejectment was brought to recover several houses, some of which were tenanted; and the notice was served upon the tenants in the usual way. Part of the property consisted of three unfinished houses: no one resided in them, and there was nothing on the premises. With respect to the latter, a copy had been stuck up on the outside. It was contended, that, under the circumstances, the service was sufficient, or, at all events, that he was entitled to a rule to shew cause why the service should not be good service; and cited *Archbold's Practice*, p. 532, &c.

Where part of the property for which an ejectment was brought consisted of three unfinished houses, which were untenanted, and there was no property in them, the Court refused to allow the service of the declaration by sticking it up on the outer door, but obliged the lessor of the plaintiff to proceed as upon a vacant possession.

ALDERSON, B.—With respect to the three unfinished houses, it would be better that the usual course should be pursued as where the possession is vacant.

Rule refused.

1835.

LEWIS v. WOOLRYCH.

Where long affidavits are filed in support of a motion, a great part of which is unnecessary, the Court will refer them to the Master, and make the party applying pay the costs of the unnecessary affidavits.

HUMFREY shewed cause against a rule which had been obtained by *Richards*, for staying proceedings on the bail-bond on payment of costs. He objected that this case had been already before a judge at chambers, and that affidavits, to the extent of 70 or 80 folios, had been filed: the greater part of which, he contended, were wholly unnecessary; and he objected, therefore, to the payment of costs, though he could not resist the motion.

Kelly and *Richards* were in support of the rule.

Per Curiam.—It must be referred to the Master to see how much of the affidavits was unnecessary. The party who made this motion must pay the costs of such parts of the affidavits.

COOPER's Bail.

An affidavit of justification, which stated that the property of the bail consisted of household furniture and effects, was held not to be sufficient, without stating where the property was.

WALESBY objected to the affidavit of justification, on the ground that it was not sufficiently precise. It was in this form: "*D. S.*, of &c., one of the bail for the above-named defendant, maketh oath and saith, that he is a housekeeper, residing at ———; that he is worth property to the amount of £——, over and above his just debts, and every other sum for which he is now bail; that he is not bail for any defendant except in this action, and except for *J. C. G.*, at the suit of *C. D.* in the Court of *King's Bench*, in the sum of £50; that this deponent's property, to the amount of the said sum of £——, over and above all his just debts, and all other sums for which he is now bail

as aforesaid, consists of household furniture and effects, and good book debts, and that deponent hath for the last six months resided at &c. aforesaid." He cited *De Bode's* Bail (a); and contended, that it did not sufficiently appear where the property was.

1835.
COOPER'S
Bail.

J. Jervis, contra, urged that the property being described as household furniture, it must be supposed to be in the house where the bail was alleged to reside.

ALDERSON, B.—I think the affidavit ought to have specified more particularly the situation of the property, and that it is defective on that ground.

Bail rejected.

(a) Ante, Vol. 1, p. 368.

CLARKE v. CROCKFORD.

C. C. JONES had obtained a rule to shew cause why the bail-bond should not be delivered up to be cancelled, for irregularity, with costs, on the ground that the affidavit to hold to bail did not specify the amount of the bill of exchange upon which the action had been brought.

After a rule nisi had been obtained for cancelling a bail-bond for a defect in the affidavit to hold to bail, the plaintiff offered to consent to a Judge's order to the same effect, the costs to be costs in the cause and no action to be brought:—*Held*, that, notwithstanding this offer, the defendant was entitled to have his rule made absolute with costs.

Wordsworth now shewed cause, on an affidavit which stated, that, after the rule nisi had been obtained, the plaintiff's attorney had offered to the defendant's attorney to consent to a Judge's order to the same effect as that contained in the rule, the costs to be costs in the cause, and no action to be brought. He contended, that, admitting the affidavit of debt to be defective, the Court would

1835.

CLARKE

v.

CROCKFORD.

not, under these circumstances, make the rule absolute with costs. *Sed*

Per Curiam.—If you had offered to pay the costs of the rule *nisi*, that would have been so; but as that was not the case, the rule must be absolute, on the terms prayed.

Rule absolute with costs.

The KING v. WOOLLETT.

A demurrer to a plea to an information on the revenue side of the Court of *Exchequer*, does not require a matter of law to be stated in the margin, according to rule 2 of *H.T. 4 W. 4*, but it must be signed by the Attorney-General before it is delivered.

JOHN JERVIS obtained a rule *nisi* to set aside the demurrer to a plea to an information, for irregularity. It was a revenue cause. The demurrer was general. The rule was moved for on two grounds:—*First*, that there was no note in the margin of the cause of demurrer, according to the second rule of *H. T. 4 W. 4*, which directs, that in the margin of every demurrer, before it is signed by counsel, some matter of law intended to be argued shall be stated; and if any demurrer be delivered without such statement, it may be set aside; and, *secondly*, that it was not signed by the Attorney-General.

Kaye shewed cause.—The rule which requires some ground of demurrer to be stated in the margin was made under the provisions of the 11 *Geo. 4* & 1 *Will. 4*, c. 70, s. 11, which enables the Judges of the superior Courts, jointly, or any eight or more of them, to make general rules for regulating the proceedings of all the Courts, in matters over which all the Courts have a *common jurisdiction*; and, therefore, this being a cause which could only be prosecuted on the revenue side of this Court, that rule does not apply; and with respect to the other objection, there is no authority for saying that the rule respecting the signature by counsel applies to signatures by the Attorney-General;

and there is an affidavit that the demurrer is now properly signed.

1835.
The KING
v.
WOOLLETT.

John Jervis, in support of the rule, contended that the demurrer was bad on both grounds; and with respect to the signature by the Attorney-General, he contended, that the signature which had been put since the rule had been obtained was of no avail. It is stated upon the affidavit, that the practice is to deliver to the clerk in court all pleadings (which require to be signed by the Attorney-General) properly signed, before they are delivered.

LORD ABINGER, C. B.—As the practice is, that all pleadings should be signed by the Attorney-General, I think they ought to be signed before delivery. The rule must therefore be absolute on that ground.

PARKE, B.—The rule which requires a matter of law to be stated in the margin is not founded on the late act of the 3 & 4 W. 4, c. 42, but upon the previous act, which directed that the Judges should, in matters over which the Courts of law have a *common* jurisdiction, make general rules of practice applicable to all the Courts. The first objection, therefore, is not sustainable. Upon the other ground, the rule must be absolute.

Rule absolute.

HILL v. PAYNE.

TURNER moved for a rule to shew cause why the *venue* should not be brought back from *Berkshire* to *Mid-* Where a defendant had changed the *venue* to the county where the cause of action arose, it was held to be no reason for bringing back the *venue*, that the action was for the balance of an election dinner, and that the defendant was treasurer of the county, and an electioneering agent, and a person of great influence there—it being a special jury cause.

1836.

HILL

v.

PAYNE.

delex, on an affidavit of the plaintiff that the action was brought to recover a sum of 99*l.* 4*s.* 6*d.*, the balance of the expense of an electioneering dinner—that the defendant was a person of great influence in the former county—that he was treasurer of the county—and an electioneering agent. It was a special jury cause.

LORD ABINGER, C. B.—There is no reason to suppose that the jurors will be improperly biassed. I think there are not sufficient grounds for the motion.

Rule refused.

DOE *d.* DRAPER *v.* DYER.

In ejectment, it is no answer to a rule for judgment as in case of a nonsuit, that the plaintiff's agent had been let into possession by the tenants, it not appearing that it was with the consent of the defendant, who was the landlord.

WHITMORE shewed cause against a rule for judgment as in case of a nonsuit, upon an affidavit, which alleged that some time before the rule had been obtained, the tenants had consented to give up possession to the agent of the lessor of the plaintiff, which they accordingly did, and that he had had possession ever since.

Welsby in support of the rule.—We are defending as landlord: perhaps the tenants had no right to give up possession to the plaintiff.

PARKE, B.—I think it ought to appear that the possession was given up with the consent of the defendant. The compromise may have taken place behind the landlord's back. A peremptory undertaking must be given.

Rule discharged on a peremptory undertaking.

1835.

GREENSLADE *v.* ROSS and Another.

THE *venue* in this action had been changed from *Middlesex* to *Lancashire*, on the usual affidavit that the cause of action arose at *Liverpool* and not elsewhere, and upon special ground that the residence of the witnesses for the defendant was in *Lancashire*. It was an action brought to recover damages for an alleged libel, published in a county newspaper, called the *Liverpool Chronicle*; to which the general issue was pleaded, and also a special plea, justifying the charges contained in the libel, which were of swindling committed at *Liverpool*. In support of an application to bring back the *venue* the plaintiff's affidavits now alleged that there was no truth in the libel, and that he believed he should not have a fair trial in *Liverpool*, it being generally understood that the next assizes would be held there. The plaintiff also swore that he had eight witnesses in *London*, and that notice of trial had been given, and briefs prepared.

PARKE, B.—He does not swear that the eight witnesses are necessary to disprove the justification.

LORD ABINGER, C. B.—If the defendant withdraws the plea of the general issue, the libel will then be admitted, and will most probably render it unnecessary to call many of the plaintiff's witnesses.

Mansel, suggested that the defendant should furnish the plaintiff with a copy of the newspaper; as that would save the expense of producing the copy filed at the Stamp Office, under the statute 38 *Geo. 3*, c. 78.

Cowling, for the defendant, having agreed to this—

The Court discharged the rule on the above terms.

Rule discharged.

In an action on the case for a libel published in a county newspaper, called the *Liverpool Chronicle*, the *venue* having been changed by the defendant upon an affidavit that the cause of action arose in the county of *Lancaster* and not elsewhere, and upon special grounds as to residence of witnesses, the Court refused to bring back the *venue* to the former county, upon an affidavit that the plaintiff had eight witnesses in *London*, and that notice of trial had been given, and briefs prepared; it appearing that several witnesses for the defendant lived at *Liverpool*, and the defendant agreeing to withdraw the general issue, rely upon his plea of justification, and furnish the plaintiff with a copy of the newspaper.

1835.

MORRIS v. SMITH.

A defendant (an attorney) was described in a writ of summons as of "*Paper Buildings, Temple:*"—*Held*, sufficient.

MILLER moved to set aside the copy and service of a writ of summons, on the ground that the defendant was not properly described. The defendant was an attorney, and was described as "of *Paper Buildings, Temple.*" He contended, that the description was not sufficient, and that some addition, such as "gentleman," ought to have been given to him.

Lord ABINGER, C.B.—The Act does not require the addition of a defendant to be given: from the place of the defendant's residence, we may presume him to be a "gentleman."

Rule refused.

WORDSWORTH v. BROWN.

In an action on a bill of exchange the defendant pleaded a plea of want of consideration, concluding with a verification: the plaintiff, instead of replying by taking issue on the plea, merely added a *similiter*. After verdict for the plaintiff, the Court *held*, that the record was imperfect, and that there must be a repleader; but, to save expense, the plaintiff was allowed to amend on payment of costs.

IN *assumpsit* on a bill of exchange by the payee against the acceptor, defendant pleaded want of consideration, concluding with a verification. The plaintiff did not reply in denial, but added the *similiter*. A verdict was given for the plaintiff.

Mansel having obtained a rule *nisi* for arresting the judgment, or for a repleader—

Humfrey shewed cause, and contended, that the defendant, by going down to trial, admitted that the issue was properly joined; and that, at all events, the plaintiff ought to be permitted, on payment of costs, to amend, so as to make the record appear correct.

Per Curiam.—There has been a mis-trial, as no issue was joined. The plaintiff, to save the formality of en-

tering a judgment of repleader to the plea, had better amend by replying to the plea, and which he may do on payment of costs. Unless he amends, there must be a repleader.

1835.
WORDSWORTH
v.
BROWN.

Rule accordingly.

See Webb v. Sharpe, 5 C. B. 400.

JOSEPH v. PERRY.

SWANN moved to discharge an order of *Gurney*, B.—A rule for a special jury had been obtained in full Court, and *Gurney*, B., ordered that it should be struck the next day. He objected that the order was irregular, because the act requires, that the jurymen should have ten days' notice (*a*), and that a Judge at chambers had no power over a rule of the full Court, and also that it was made upon the mere statement of the plaintiff's attorney without any affidavit.

The usual rule having been obtained for a special jury by the defendant, a judge at chambers, upon the statement of the plaintiff's attorney, without affidavit, ordered a special jury to be struck next day. The Court refused to set aside that order as being irregular.

PARKE, B.—We cannot lay it down as a general rule, that a Judge at chambers can act only upon affidavit. It would be a great evil to suitors if it were so; and as it does not appear that any objection was made to the learned Judge that he had no power over a rule of the full Court, I think this rule should be refused.

The other Barons concurred.

Rule refused.

(*a*) 6 Geo. 4, c. 50, s. 25.

1835.

LEWIS v. BROWNE.

The Court refused to set aside an interlocutory judgment (which had been irregularly signed three years ago) upon payment of costs, though proceedings by *scire facias* had been only lately commenced.

E. V. WILLIAMS shewed cause against a rule which had been obtained by *Knowles*, calling upon the plaintiff to shew cause why the interlocutory judgment and *scire facias* issued thereon should not be set aside on payment of costs. The judgment was signed in 1831, and in 1832 an application was made to a judge at chambers to set the judgment aside for irregularity, on the ground that no rule to plead was given; and the Judge refused to make an order. The present application therefore is much too late.

Knowles in support of the rule.—The judgment was clearly irregular for want of a rule to plead, and there has been a long interval between the judgment and *scire facias*, which was only lately sued out. This application is made upon payment of costs to let the defendant in to plead.

Per Curiam.—The motion is too late.

Rule discharged with costs.

SWAIN and Others v. LEWIS.

To an action on a bill of exchange against an indorser, the defendant pleaded that he had no notice of presentment, and concluded his plea to the country. The plaintiff omitted to add the *similiter*; and after a verdict for the plaintiff, the defendant moved for a new trial because there was no issue joined: but as the plea concluded with an "&c.",—*Held*, that, after verdict, the "&c." might be considered to include the *similiter*, and that the record was sufficient.

ASSUMPSIT on a bill of exchange by the payee against the indorser. The defendant pleaded want of notice of the presentment, and concluded his plea to the country. No *similiter* was added, and the cause went down to trial. The plaintiff having obtained a verdict, a rule *nisi* was obtained by *Mansel* to set aside the verdict, and for a new

trial. The plaintiff omitted to add the *similiter*; and after a verdict for the plaintiff, the defendant moved for a new trial because there was no issue joined: but as the plea concluded with an "&c.",—*Held*, that, after verdict, the "&c." might be considered to include the *similiter*, and that the record was sufficient.

trial. It was contended, that, as the plaintiff had not added the *similiter*, issue had not been joined, and that the trial was improperly had.

1835.

SWAIN
v.
LEWIS.

Humfrey shewed cause.—The defendant's plea concluded with an "&c.," which may be considered as including the *similiter*, which is mere form.

PARKER, B.—As there is an "&c." at the end of the plea, I think that is sufficient after verdict.

The rest of the Court concurred.

Rule discharged.

BEST v. ARGLES.

W. H. WATSON, on behalf of the defendant, applied for a rule to shew cause why a sum of 106*l.* should not be paid out of Court to the defendant, unless the plaintiff put in an answer to a bill filed in *Chancery* for an injunction within three weeks. The plaintiff was the assignee of an insolvent debtor, and the question between these parties was, whether the defendant was entitled to retain a sum of money which he had received under an order from the bankrupt, or whether the money passed to the assignees. The cause was tried, and the plaintiff nonsuited; but upon a motion to enter a verdict for the plaintiff, the Court was of opinion that the assignee was entitled at law to recover the money, and that the defendant's only remedy was in equity. The money was ordered to be paid into Court to abide the event of an application to the Court of *Chancery*; and the Court also made an order, upon an ap-

Where a defendant was sued at law for a sum of money, and the Court allowed him to pay it into Court to abide the event of an application by him to the Court of *Chancery* for an injunction, which was accordingly made in *January*, 1834, but the plaintiff having absconded without entering an appearance, the defendant was unable to get an injunction on the merits, though he had got the common injunc-

tion, this Court refused to make an order that the defendant might receive the money out of Court, though a considerable time had elapsed since the bill was filed.

1835.

BEST
v.
ARGLES.

plication for that purpose, that execution should be stayed till the question in the Court of *Chancery* was decided. A bill in *Chancery* was accordingly filed in *January*, 1834, by the defendant in this suit, and all means were adopted to compel an appearance by the defendant in that suit (the present plaintiff), and to make him put in an answer; but he having absconded, and his attorney refusing to enter an appearance for him, an injunction was obtained, but not upon the merits, and the bill could not be taken *pro confesso*, because it would be necessary for the plaintiff in the *Chancery* suit to make an affidavit that the defendant was out of the jurisdiction of the Court, and the plaintiff was not in a condition to make such an affidavit. It was now contended, that Mr. *Argles* having waited a reasonable time, and nothing having been done by the plaintiff in this suit to shew that he intended to resist the application to the Court of *Chancery*, the defendant ought to be allowed to take out the money, otherwise it might remain in Court for ever.

LORD ABINGER, C. B.—I do not see how this Court can make the order required. I think that any application on the subject should be made to the Court of *Chancery*.

PARKE, B.—I think this Court has done as much as it ought to do. Perhaps the Court of *Chancery* might hold the defendant was not entitled to the money. I think this rule should be refused.

Rule refused.

1835.

In re EDWARD BARWICK.

AMOS moved for an attachment for disobedience to a rule of Court, which had been made absolute against an executor for not accounting.

The rule *nisi* was personally served, but not the rule absolute. Several attempts had been made to serve him personally, but without success; and it was alleged in the affidavit, that he kept out of the way to avoid being served. A copy had been left with the defendant's daughter at his residence.

PARKE, B.—You must make out a very strong case before the Court will allow any thing short of a personal service to be sufficient.

The Court granted a rule *nisi*, which was afterwards made absolute, no cause being shewn (a).

(a) In *Re Fennell*, a similar rule was granted, where the service was on the wife, who said that her husband was in difficulties, and

kept out of the way; and the rule was afterwards made absolute. *Exch.* same Term.

A rule for an attachment against an executor for not accounting pursuant to a rule of Court was made absolute, though that rule had not been personally served, upon an affidavit that the defendant kept out of the way to avoid being served, and that a copy had been left at the house with the daughter of the defendant.

RICHMOND v. PARKINSON and LORD.

WILMORE moved for an attachment against both the defendants, for non-payment of money pursuant to an award and the Master's *allocatur*, the amount of damages having been referred, at the trial, to an arbitrator. *Parkinson* had been personally served, and a demand made upon him; but though four attempts had been made to serve the other defendant, the plaintiff had been unable to do so, and only his wife and his clerk could be

Personal service must be effected before an attachment can be obtained for non-performance of an award on which an action will lie.

1835.

RICHMOND

v.

PARKINSON.

met with, who said, that the defendant could not be seen, being in a bad state of health and very much engaged. It was also sworn, that the defendants' attorney had undertaken to indemnify both the defendants from all costs.

PARKE, B.—You may take your attachment as to *Parkinson*, but not as to *Lord*; for the rule is not to grant an attachment without personal service, where there is another remedy. This is an award on which an action will lie; you may elect, therefore, whether you will bring your action against both, or have an attachment against *Parkinson* only.

Rule accordingly.

HILL v. PROSSER.

A motion to postpone a trial, on account of the absence of a material witness, need not be supported by an affidavit of merits.

THIS was an application by the defendant to postpone the trial of a cause till the sittings in *Trinity* Term, upon an affidavit of the absence of a material witness.

W. H. Watson, in shewing cause, objected that there was no affidavit of merits.

PARKE, B.—Generally, upon such a supervenient discovery as the absence of a material witness, it is not necessary to swear to merits for the purpose of a motion of this nature.

The rule was disposed of on other grounds.

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SMITH v. RIGBY.

JOHN JERVIS shewed cause against a rule which had been obtained by *Cowling*, for judgment as in case of a nonsuit. The affidavit on which the rule was obtained, stated, that issue was joined on the 24th *November* last, and that the plaintiff had not proceeded to trial. It did not say that any notice of trial had been given. He objected that the affidavit ought to have shewn, whether it was a town or country cause; and he contended, that if it was a country cause, as no notice of trial was given, the motion ought not to have been made till after the second assize (a).

Where issue was joined on the 24th *November*, in a country cause, and the plaintiff did not give notice of trial:—*Held*, that judgment as in case of a nonsuit might be moved for after one assize had passed. Unless the *similiter* is added, issue cannot be said to be joined for the purpose of such a motion.

The Court overruled these objections, and held, that either way the plaintiff had made default.

It was then objected, that issue was not joined, the *similiter* not having been added. To this it was answered, that, as the last pleading concluded to the country, the *similiter* might have been added by the plaintiff at any time.

The Court held the objection fatal.

Rule discharged.

(a) See note to R. 69, H. T., 2 Will. 4, Jervis's Rules.

STOUGHTON, Executor, v. The Earl of KILMOREY.

DECLARATION in *assumpsit*, on a promissory note, given by the defendant to the testator.

Plea—that the Earl made the said promissory note in the said first count mentioned without any value or consideration whatever for so doing, or for his paying the amount thereof, or any part thereof. And this the said Earl is ready to verify, &c.

Demurrer, assigning for special cause, that it does not

To an action on a promissory note, by the executors of the payee against the maker, the defendant pleaded that he made the note without any consideration:—*Held* bad upon special demurrer.

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appear by the plea how there was no consideration; and that the plea ought to have concluded to the country, and not with a verification.

Chandless in support of the demurrer.—The plea merely says that the Earl made the note without any consideration:—that might be perfectly true, and yet the action might be maintained in respect of some consideration at the time of the delivery of the note or afterwards. *Easton v. Pratchett* (a) may be considered as having decided that such a plea is bad upon special demurrer.

Wightman was called upon by the Court to support the plea.—If the note was made without any consideration, it was a good defence to plead that fact, and no inconvenience would arise to the plaintiff, because a general replication would be sufficient, and the defendant would be bound to shew affirmatively at *Nisi Prius* that there was no consideration for the bill. It was decided in *Bramah v. Baker* (b), that it was unnecessary to state the consideration in a replication.

LORD ABINGER, C. B.—All the benefit intended by the new rules would be lost if we were to allow such a plea as the present. The plea ought to have shown how there was no consideration.

PARKE, B.—It was intimated in *Easton v. Pratchett*, that such a plea as the present would probably be held bad on special demurrer; and I am of opinion that it is. The plea ought to contain affirmative matter.

Wightman applied to amend, but the Court said that they could only allow an amendment upon a special affidavit of merits.

Judgment for the plaintiff.

(a) Ante, p. 473.

(b) Ante, p. 392.

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LOWLESS v. TIMMS.

CROMPTON, on behalf of the defendant, moved for leave to change the *venue* on the usual terms. The officers, he stated, objected to draw up the rule, because they knew that the plaintiff was an attorney, though he did not sue as such, but appeared by another attorney. He contended, that as the plaintiff did not sue as a privileged person, the officers had no right to take notice of it.

If the plaintiff, being an attorney, does not sue as such, but appears by another attorney, the defendant may change the *venue* as a matter of course, on the usual affidavit.

ALDERSON, B.—You are entitled to your rule.

Rule granted.

SCALES v. SARGESON.

UPON an execution issuing against the defendant in this action, a claim was made by a person of the name of *Sanders* to the goods seized by the sheriff. An application was thereupon made to the Court, under the Interpleader Act, and an issue directed to be tried between the claimant and the plaintiff, upon the former bringing 27*l.* into Court. The claimant having neglected to pay in the money or try the cause—

Addison obtained a rule *nisi*, calling upon the claimant to shew cause why the sheriff should not sell, and pay over the money to the execution creditor, and why the claimant should not pay the costs occasioned by his false claim, and of this application.

Mellor shewed cause, but objected only to that part of the rule which claimed the costs of this application, on the

Where, in consequence of a claim made to goods seized by a sheriff in execution, the Court ordered the claimant to proceed to trial, upon paying a sum of money into Court, which he neglected to do, and a rule was then obtained to compel him to pay the costs occasioned by his false claim:—*Held*, that he was liable to pay those costs as well as the costs of that rule, though no previous application had been made to him.

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ground, that his client would have consented to the rule, but that no previous application had been made to him; and the only reason for not paying the money into Court was, that the claimant had not been able, from poverty, to raise sufficient for that purpose.

Addison contended, that he was obliged to come here to get the costs occasioned by the false claim.

The Court being of that opinion made the rule absolute on the terms prayed.

BEAL's Bail.

THIS was a case of country bail.

A notice to justify at eleven, all parties appearing at ten:—*Held*, sufficient.

An affidavit of notice of justification, which omitted to state where the bail resided for the last six months, and also whether they were householders or freeholders:—*Held*, not to be cured by the affidavit of justification according to the old rules, though it contained those requisites; and time to amend was refused, the bail having been put in too late; and also the costs of opposition.

Chandless objected to the notice of justification. It was, that the bail would justify at eleven o'clock, whereas the time of justification was ten.

ALDERSON, B.—As you are here to oppose, I think that objection cannot be supported.

Chandless then took another objection, that the notice of bail did not specify where the bail had resided for the last six months, nor whether they were housekeepers or freeholders. The affidavit of justification was, however, correct in those points.

ALDERSON, B., held the objection fatal; but refused to allow the costs, as the objection was only a technical one. He also refused time to amend, as it appeared that the bail had not been put in in time.

Bail rejected.

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SHATWELL v. BARLOW.

THIS was an action of *assumpsit*, tried at *Chester*, at the last Assizes, and was brought to recover 35*l.*, the price of certain cistern stones supplied by the plaintiff to the defendant. The latter was arrested for 20*l.*, 15*l.* having been paid; and the plaintiff recovered only 8*l.*

The defendant was arrested for 20*l.* and the plaintiff recovered only 8*l.*, but it appeared that the price of the goods for which the action was brought had been agreed upon in writing, which the plaintiff, by accident, was unable to prove at the trial, and there was contradictory evidence as to the value of the goods:—
Held, that the defendant was not entitled to costs under the 43 *Geo.* 3, c. 46.

John Jervis having obtained a rule calling on the plaintiff to shew cause why the defendant should not have his costs under the 43 *Geo.* 3, c. 46, s. 3—

Townsend shewed cause.—The plaintiff, he contended, had reasonable cause for arresting the defendant. From the affidavits in answer to the rule, it appeared that the price of the stones had been agreed upon between the parties, but, in consequence of the absence of the plaintiff's son, the agreement which was in Court could not be proved, and there was contradictory evidence as to the value of the stones.

Jervis was heard in support of the rule.

Per Curiam.—We cannot say that the plaintiff had no reasonable or probable cause to arrest for the larger sum.

Rule discharged.

SHARMAN v. STEVENSON.

DECLARATION for 100*l.* had and received by the defendant to the plaintiff's use, and on an account stated.

A plea of payment into Court must follow the form given by the new rules,

and if other pleas are pleaded to part of the plaintiff's demand, the plea of payment into Court should be put last, and pleaded to the residue.

A special demurrer to a plea of payment of money into Court, that "it varies from the form given by the rule," is sufficient to raise an objection that the plea is bad for want of a proper conclusion of a prayer of judgment.

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The defendant pleaded thus:—"As to the sum of 25*l.*, parcel of the monies in the said declaration mentioned, that the plaintiff ought not further to maintain his action, because the defendant now brings into Court here the said sum of 25*l.* ready to be paid to the plaintiff; and the defendant further saith, that the plaintiff hath not sustained damage to a greater amount than 25*l.*, in respect of the causes of action in the said declaration mentioned as to the said sum of 25*l.*; and this the defendant is ready to verify. And, as to the residue of the said monies in the said declaration mentioned, the said defendant saith that he did not promise in manner and form as the plaintiff hath above alleged; and this he prays may be inquired of by the country, &c." The plaintiff demurred, and assigned for special cause, that the plea was not in the form given by the late rule, nor as near to it as might be. The defendant joined in demurrer.

Waddington, in support of the demurrer.—This plea deviates from the prescribed form in a way that is calculated to embarrass the plaintiff. The 17th rule of the pleading rules (a) directs that the payment of money into Court shall be pleaded in the particular form there pointed out. This plea is not pleaded to the whole of the plaintiff's demand, as it is in the form given by the Court, but it divides the claim into two parts; and the conclusion with a prayer of judgment if the plaintiff ought further to maintain his action, is altogether omitted; and therefore, according to rule 9, which directs that where there is no prayer of judgment the plea is considered to be in bar to the action generally, this plea must be understood to be so pleaded; and is therefore bad on both grounds.

Humfrey, in support of the plea.—The form given by

(a) 3 & 4 Will. 4, H. T., Ante, Vol. 2, p. 320.

the new rules is certainly not applicable to every case, and therefore it could only have been intended that that form should be adopted as nearly as it could be, where it was necessary to make some alteration. Here payment into Court is pleaded as to part, and the general issue as to the residue: there can be no difficulty in taking issue on the plea in this form.

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PARKE, B.—I can conceive that there may be a great difficulty in some cases by pleading in this form; the payment into Court should always be pleaded last as to the residue, after all the other parts of the demand are exhausted: but the plea is clearly bad on the other ground, because there is no prayer of judgment.

ALDERSON, B.—I think the plea is bad on both grounds.

Humfrey objected that the cause of demurrer was not sufficiently specified, as it merely referred to the 17th rule.

PARKE, B.—I think it is. You may have leave to amend on payment of costs.

YAROTH v. HOPKINS.

CROWDER shewed cause against a rule for setting aside an attachment which had been obtained against the late sheriff of *Monmouthshire*, for irregularity, with costs.

A *f. fa.* was put into the sheriff's hands on the 14th December, 1833, returnable on the 30th. The sheriff

went out of office on the 14th of *February* following. A rule to return the writ was taken out in *June* following, which was served in the same month on the undersheriff of the new sheriff; but it was not served on the undersheriff of the old sheriff till *November* following:—*Held*, that an attachment afterwards obtained against the old sheriff for not returning the writ was irregular; and the Court set it aside.

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A fi. fa. was issued against the defendant on the 14th December, 1833, directed to the then sheriff, who went out of office on the 14th February, 1834; a rule to return the writ was not taken out till June, 1834, of which rule it appeared that there had been two services. The first service, which was in June, 1834, was on the undersheriff of the new sheriff; the second service, which was on the undersheriff of the old sheriff, was not till the 12th November, 1834, which was more than six months after that sheriff had been out of office; and it was on the ground that a sheriff could not be called upon to return a writ six months after he was out of office, that the present rule had been obtained. It was now contended, that the old sheriff ought not to have kept the writ, whether it was excuted or not; but it should have been handed over to the new sheriff, and the 3 & 4 Will. 4, -c. 99, s. 7 (a)

(a) By which it is enacted, "That every sheriff of any county, city, liberty, division, town corporate, or place, shall, at the expiration of his office, make out and deliver to the new or incoming sheriff, a true and correct list and account, under his hand, of all the prisoners in his custody, and of all writs and other process in his hands *not wholly executed by him*, with all such particulars as shall be necessary to explain to the said incoming sheriff the several matters intended to be transferred to him, and shall thereupon turn over and *transfer* to the care and custody of the said incoming sheriff all such prisoners, *writs*, and process, and all records, books, and matters appertaining to the said office of sheriff; and the said incoming sheriff shall thereupon sign and give a duplicate of such

list and account to the sheriff going out of office, to whom the same shall be a good and sufficient discharge of and from all the prisoners therein mentioned *and transferred to the said incoming sheriff*, and the further charge of the execution of the writs, process, and other matters therein contained, without any writ of discharge or other writ whatsoever; and the said incoming sheriff shall thereupon stand and be charged with the said prisoners, and also with the execution and care of the said writs, process, and other matters contained in the said list and account, as fully and effectually as if the same writs and process had been turned over by indenture and schedule; and in case any sheriff shall refuse or neglect at the expiration of his office to make out, sign, and deliver such list and

was referred to; which act, it was contended, applied to all writs not wholly executed. The writ was returnable on the 30th of *December*, before the old sheriff went out of office: it therefore ought to have been executed by him; and, if it was not, the writ ought to have been handed over to the new sheriff; and the service upon the new sheriff was proper. It must be presumed that the writ was transferred to the new sheriff; who by the terms of the act is charged with the further execution of the writ: either one or the other, therefore, ought to have made a return; and, it is laid down in *Tidd's Practice* (a), that, where the writ is executed by the old sheriff while in office, he ought to make his return to the same, and hand such writ and return over to the new sheriff who comes into office before the return day; and such new sheriff will return the writ with the old sheriff's return thereon; and, if the old sheriff, after arresting a defendant, suffer him to escape, and go out of office before the return day, he is answerable for the escape. If there be no return, it is a contempt; for which the Court, on a proper affidavit, will grant a rule for an attachment; and this is the constant mode of proceeding against the late sheriff as well as the present one; for, as to the former, he ought in strictness to have returned the writ before he was out of office, and therefore the contempt was actually committed whilst he was a servant of the Court. It therefore appears that one or both of the sheriffs are guilty of a contempt, though not ruled; and, unless this attachment can stand, the plaintiff is without remedy, as he is too late now to rule the new sheriff.

PARKE, B.—If the old sheriff had seized, he must have

account as aforesaid, and to turn over the process aforesaid in manner aforesaid, every such sheriff so neglecting or refusing shall be liable to make such satisfaction,

by damages and costs to the party aggrieved, as he, she, or they shall sustain by such neglect or refusal."

(a) 9th Ed. p. 307.

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gone on with the execution. By the new act, the old sheriff is to transfer all writs not wholly executed, which are in the list made out by him. I think that the old sheriff could not be brought into contempt, without serving him with the rule. The passage in *Tidd* must, I think, be understood to imply that the sheriff has been ruled. The plaintiff has his remedy by action, but he is precluded from an attachment by his own laches in not ruling the sheriff.

The other Barons concurring—

Rule absolute.

W. H. Watson, in support of the rule.

REDELL v. PAKEMAN.

A defendant, against whom a *capias* issued, and afterwards an *exigi facias*, rendered himself to the custody of the sheriff, who for default of bail put him in prison. The affidavit of debt was for 20*l.* and upwards, on a promissory note, but it did not state the amount for which the promissory note was drawn. The defendant brought trespass for false imprisonment against the plaintiff in the action:—*Held*, that such action would not lie while the writ was in existence, though, if the defendant had applied to the Court, he would have been discharged out of custody.

TRESPASS for false imprisonment. *Plea*.—As to the assaulting and laying hold of the plaintiff, and compelling him to go from and out of the said dwelling-house into the said public street, and forcing and compelling him to go in and along the said other public streets to the said prison, as in the said declaration mentioned, and as to the imprisoning the said plaintiff, and keeping and detaining him in prison for the said space of time as in the said declaration mentioned, the said defendant says that the said plaintiff heretofore and before and at the time of the issuing of the said several writs hereinafter mentioned, and also at the time of the committing the said supposed trespasses hereinafter mentioned, was indebted to the defendant in a large sum of money, to wit,

the plaintiff in the action:—*Held*, that such action would not lie while the writ was in existence, though, if the defendant had applied to the Court, he would have been discharged out of custody.

20l.: and the said defendant further saith that the said plaintiff being so indebted to him the defendant, he the said defendant, for the recovery of the said debt, heretofore, to wit, on the 27th day of *May*, A.D. 1834, sued and prosecuted out of the Court of our said lord the now King, before the Barons of his Majesty's *Exchequer* at *Westminster*, a certain writ of our said lord the King, called a *capias*, directed to the sheriff of the county of *Middlesex*, by which said writ our said lord the King commanded the said sheriff that he should omit not by reason of any liberty in his bailiwick, but that he should enter the same and take the said plaintiff, if he should be found in his the said sheriff's bailiwick, and him the said plaintiff safely keep until he should have given the said sheriff bail or made deposit with him according to law in an action on promises, at the suit of the said defendant, or until the said plaintiff should by other lawful means be discharged from the said sheriff's custody; and by the said writ our said lord the King further commanded him the said sheriff, that, immediately after the execution thereof, he the said sheriff should return the said writ to our said lord the King's said Court, together with the manner in which the said sheriff should have executed the same, and the day of the execution thereof, or that, if the same should remain unexecuted, then that he the said sheriff should so return the same at the expiration of four calendar months from the date thereof, or sooner if he the said sheriff should be thereto required by order of the said Court, or by any Judge thereof. And the said defendant further saith, that the said writ afterwards and before the delivery thereof to the said sheriff of the said county of *Middlesex* to be executed as is hereinafter mentioned, to wit, on the said 27th day of *May*, A.D. 1834, was marked and indorsed for bail in a certain sum, to wit, the sum of 20l.; and that the said writ so indorsed was afterwards and within four calendar months from the date thereof, includ-

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ing the day of such date, to wit, on the said 27th day of *May*, in the year of our Lord 1834, last aforesaid, delivered to *Samuel Wilson, Esq.*, and *James Harmer, Esq.*, who then and from thence until and at and after the return of the said writ hereinafter mentioned were sheriff of the said county of *Middlesex*, in due form of law to be executed. And the said defendant further says, that, afterwards, and after the expiration of fifteen days from the time of the delivery of the said writ of *capias* to the said sheriff as aforesaid, to wit, on the 13th day of *June*, in the year aforesaid, the said *S. W., Esq.*, and *J. H., Esq.*, as such sheriff as aforesaid (they having been before that day, to wit, on the 12th day of *June*, in the year of our Lord 1834, required by the said Court to return the said writ), duly *returned* the same to the said Court, and by that return stated to the said Court that the said plaintiff was not found in their bailiwick: whereupon the said now defendant, according to the form of the statute in such case made and provided, afterwards, to wit, on the day of the return of the said writ of *capias*, to wit, on the said 13th day of *June*, A. D. 1834, sued and prosecuted out of the Court of our said lord the now King, before the Barons of his *Exchequer* at *Westminster*, a certain writ of our said lord the King, called a writ of *exigi facias*, returnable more than fifteen days from the day of the teste thereof, to wit, on the 3rd day of *November* then next following, and directed to the sheriff of the county of *Middlesex*, by which said last-mentioned writ, our said lord the King commanded the said sheriff that he should cause the said plaintiff to be demanded from county Court to county Court, until according to the law and custom of *England*, he should be outlawed if he did not appear, and, if he did appear, then that the said sheriff should take him and cause him to be safely kept until he should have given bail to or made deposit with the said sheriff in an action on promises at the suit of the said defendant, or

until the said plaintiff should be by other lawful means discharged from the custody of the said sheriff; and our said lord the King did further command the said sheriff, that the said sheriff should make known to the said Court at *Westminster* how he should have executed the said writ, on the 3rd day of *November*, A.D. 1834: which said last-mentioned writ was afterwards, and before the delivery thereof to the said sheriff as hereinafter mentioned, indorsed for bail for 20*l.*; and the said writ so indorsed was afterwards, to wit, on the 17th day of *June*, A.D. 1834, delivered to the said *S. W.*, Esq., and *J. H.*, Esq., who then and from thence until and at the time of the indorsement of the said writ as hereinafter mentioned, were sheriff of the said county of *Middlesex*, to be executed. And the said defendant further saith, that, afterwards, and more than fifteen days after the said writ was so delivered to the said *Samuel Wilson*, Esq., and *James Harmer*, Esq., as aforesaid, to wit, on the said 3rd day of *November*, A.D. 1834, one *Alexander Raphael*, Esq., and one *John Illidge*, Esq., then having duly become and being sheriff of the said county of *Middlesex* in lieu and stead of the said *S. W.*, Esq., and *J. H.*, Esq., and to whom the said *S. W.*, Esq., and *J. H.*, Esq., as such sheriff as aforesaid, at the time of their going out of the said office of sheriff of the said county of *Middlesex*, to wit, on the 27th day of *September*, A.D. 1834, had duly indorsed and delivered the said writ, made known to the Barons of the Court at *Westminster* how the said last-mentioned writ had been executed; by whose return to the said writ, and by an indorsement upon the said writ, it appeared to the said Court, that, at the county Court of the said *S. W.* and *J. H.*, Esqrs., while they were such sheriff of the said county of *Middlesex*, holden in and for the said county of *Middlesex*, at the house known by the name of the *Sheriffs' Office*, in *Red Lion Square*, on the 7th day of *August*, in the fifth year of the reign of our said lord the King, the said

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now plaintiff was a first time demanded, and did not appear; and also that at a county Court of the said *S. W.*, Esq., and *J. H.*, Esq., whilst they were such sheriff of the said county of *Middlesex* as aforesaid, holden in and for the same county, at the house above-mentioned, on the 4th day of *September*, in the fifth year aforesaid, the said now plaintiff was a second time demanded, and did not appear; and the said *A. R.*, Esq., and *J. I.*, Esq., further returned, that, at the county Court in and for the said county of *Middlesex*, holden by them as such sheriff as aforesaid, at the house above-mentioned, on the 2nd day of *October*, in the fifth year aforesaid, the said now plaintiff was a third time demanded, and did not appear; and that at a county Court holden by them as such sheriff as aforesaid, in and for the county of *M.*, at the house above-mentioned, on the 30th day of *October*, in the fifth year aforesaid, the said now plaintiff was a fourth time demanded; and the said now defendant further saith, that afterwards, to wit, on the said 31st day of *October*, A.D. 1834, the said now plaintiff appeared and voluntarily rendered himself to the said *A. R.*, Esq., and *J. I.*, Esq., as such sheriff of the said county as aforesaid: and the said defendant further saith, that thereupon the said *A. R.*, Esq., and *J. I.*, Esq., so being sheriff of *M.* as aforesaid, and the said now defendant in aid and assistance of the said sheriff, and by their command, on the day and year last aforesaid, within their bailiwick, to wit, in the county of *M.* aforesaid, under and by virtue of the said last-mentioned writ, and before the return thereof, took him the said now plaintiff, and then for default of bail seized and laid hold of the now plaintiff, and then forced and compelled him the said plaintiff to go from and out of the said dwelling-house in the said declaration mentioned, into the said public street, and then forced and compelled him the plaintiff to go in and along the said other public streets in the said declaration mentioned, to the said prison therein men-

tioned, and there imprisoned the said now plaintiff and kept and detained him in prison for the said space of time in the said declaration mentioned, as the said sheriff lawfully might for the cause aforesaid; which are the said several supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath in his declaration above complained against the now defendant: and this the said now defendant is ready to verify. Wherefore, &c.

Replication.—The plaintiff saith that no affidavit was made and filed of record of the alleged cause of action of the defendant against the plaintiff in the said Court of his Majesty's *Exchequer*, at *Westminster*, before the issuing of the said supposed writ of *capias* in the said last plea mentioned, according to the form of the statute in such case made and provided. And this the plaintiff is ready to verify.

Rejoinder.—The defendant saith, that an affidavit was made and filed of record of the said cause of action of the said now defendant against the now plaintiff, in the said Court of his Majesty's *Exchequer*, at *Westminster*, before the issuing of the said writ of *capias* in the said last plea mentioned, according to the form of the statute in such case made and provided; and which said *affidavit* was as follows; that is to say, "In the *Exchequer of Pleas*, *Wm. Pakeman*, of the borough of *Tamworth*, in the counties of *Warwick* and *Stafford*, cheese-factor, maketh oath and saith, that *Joseph Hadley Reddell* is justly and truly indebted to this deponent in the sum of 20*l.* and upwards, on a promissory note, drawn by the said *Joseph Hadley Reddell*, payable to one *Charlotte Moore*, or order, at a day now past, and by her indorsed to this deponent *William Pakeman*. Sworn at the borough of *Tamworth* aforesaid, the 19th day of *May*, 1834, before me, *J. Woodcock*, by commission," as by the said affidavit duly filed and re-

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maining of record in the said Court of *Exchequer* appears: And this the said defendant is ready to verify by the said record.

Demurrer.—The said plaintiff says, that the rejoinder is not sufficient in law, because the said affidavit of the cause of action, as required by the statute in such case made and provided, does not state or shew the amount for which the said promissory note was drawn, or the amount for which it was payable, but merely states that the plaintiff was justly and truly indebted unto this defendant in the sum of 20*l.* and upwards, on a promissory note drawn by the said plaintiff, payable to one *Charlotte Moore*, or order, at a day now past, and by her indorsed to this defendant.

Joinder in demurrer.

Petersdorff, in support of the demurrer.—This demurrer raises the question whether the affidavit which was made in this case is sufficient within the 12 *Geo.* 1, c. 29, and whether a plaintiff can lawfully arrest a defendant upon an insufficient affidavit. It was held in *Parsons v. Lloyd (a)*, that a plaintiff who arrested a defendant upon a *capias ad respondendum* tested in *Hilary* Term and returnable in *Trinity* Term following, was liable to an action of trespass, and that he could not justify under a void or irregular writ. In order to authorize an arrest, a proper affidavit must be made, according to the practice of the Court, otherwise the arrest is an unauthorized proceeding. The objection here goes to the foundation of the instrument, for, consistently with this affidavit, the plaintiff may have had no right to arrest; and it is more incumbent on the plaintiff to be exact and positive in his affidavit, because the defendant is not allowed to introduce any con-

(a) 3 Wils. 341; 2 W. Bla. 845, S. C.

tradictory affidavit, nor the plaintiff an explanatory one; the affidavit, therefore, being clearly insufficient, the arrest was wrongful, and the defendant, having done no act to waive his right to sue for damages, is entitled to maintain this action.

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LORD ABINGER, C. B.—I am of opinion that this action cannot be maintained. It does not follow, that, because the Court would discharge a defendant from custody where the affidavit is defective, that therefore an action will lie for false imprisonment. In *Parsons v. Lloyd* the writ was held to be a nullity; and a distinction has always been drawn between proceedings which are absolutely void, and those which are only voidable.

PARKE, B.—The defendant ought to have applied to set aside the writ. As that has not been done, he is not entitled to sue as for a trespass.

ALDERSON, B.—This affidavit may be right, or it may be wrong. If an application had been made to discharge the defendant, the Court, if they had granted the application, would only have done so on the terms of bringing no action; but they would have no right to do so if the proceedings were altogether void.

Judgment for defendant.

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To a declaration in *assumpsit* on a banker's check the defendant pleaded that there was no consideration either for the making or paying it. The replication stated that at the time of the making the check there was a good consideration. At the trial, it appeared that the plaintiff was an auctioneer, and had been employed to sell some property by auction; and that one of the conditions of sale was, that the purchaser should make a deposit. When the property was put up to sale, the defendant became the purchaser, and the check was given for the deposit in part payment. The payment of the check was resisted, on the ground that the property was mis-described, and that the vendor was not in a condition to convey what he pretended to have sold. The

Judge was of opinion that the property had been fraudulently mis-described by the plaintiff, to enhance the price. A verdict was taken for the plaintiff, subject to the opinion of the Court, whether or not the defence could be given in evidence upon this plea:—*Held*, that, though the plea would have been bad on demurrer, it was sufficient after verdict; and that, as the plaintiff's fraud rendered the transaction null and void *ab initio*, the plea was proved, and that the verdict should therefore be entered for the defendant.

ASSUMPSIT.—The declaration stated that whereas the defendant, heretofore, to wit, on the 21st day of *August*, A. D. 1834, made his certain draft or order in writing for the payment of money, commonly called a banker's check, bearing date, to wit, the day and year aforesaid, and then directed the said draft or order to certain persons by the style and direction of the cashiers of the Bank of *England*, and thereby then required the said cashiers of the Bank of *England* to pay to the plaintiff, or bearer, 39*l.* 18*s.*, and then delivered the said draft or order to the plaintiff; and the plaintiff avers, that, after the making of the said draft or order, and before the payment of the said sum of money therein specified, to wit, on the day and year aforesaid, the said draft or order was duly presented and shewn to the said cashiers of the Bank of *England* for payment thereof, and they were then requested to pay the said sum of money therein specified, according to the tenor and effect thereof; but that the said cashiers of the Bank of *England* did not, at the said time when the said draft or order was so shewn and presented to them for payment thereof as aforesaid, or at any time afterwards, pay the said sum of money therein specified, or any part thereof; whereof the defendant afterwards, to wit, on the day and year aforesaid, had notice. And the defendant, in consideration of the premises, afterwards, to wit, on the day and year aforesaid, promised the plaintiff to pay him the said sum of money in the said draft or order specified, on request. And whereas also the defendant, heretofore, to wit, on the 1st day of *September*,

1834, was indebted to the plaintiff in 100*l.*, for money found to be due from the defendant to the plaintiff on an account then stated between them; and the defendant, in consideration of the last-mentioned premises, afterwards, to wit, on the same day and year aforesaid, promised the plaintiff to pay him the said last-mentioned money on request: yet the defendant hath not paid the said monies, or either of them, or any part thereof; to the plaintiff's damage of 100*l.*

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Plea.—As to the first count of the said declaration, that there was not at any time any consideration or value for his the defendant's making the said draft or order, or for his paying the amount thereof, or any part thereof. As to the last count, *non assumpsit*.

Replication.—As to the first plea, that, heretofore, and before and at the time of the making of the said draft or order as in the said declaration is mentioned, to wit, on the day and year in the declaration in that behalf mentioned, there was a good, valid, and sufficient consideration for his the defendant's making the said draft or order in manner and form as in the declaration is mentioned: and this the plaintiff prays may be inquired of by the country.—*Similiter*.

At the trial before Mr. Baron *Parke*, at the sittings in last term, it appeared that the plaintiff was an auctioneer, and had been employed by the direction of the assignees of *Sutton*, a bankrupt, to dispose of certain property, which was described in the particulars of sale as a valuable lease, held under the city of *London*, for the term of fifty-eight years, wanting ten days, from *June*, 1831, of a dwelling-house, workshop, and yard, situate in the *Borough Road*, subject to a ground-rent of 15*l.* per annum; and by the conditions of sale the purchaser was to pay a deposit of 20 *per cent.* in part of the purchase money to the auctioneer, and, on payment of the remainder of the purchase money, the purchaser was to have an original

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lease of the property from Mr. *G. H. Malme*. At the sale, the defendant became the purchaser; and the check on which the action was brought was given as the deposit in part payment. The defence was that the property was mis-described in the particulars of sale, and that the vendor could not convey what he professed to sell; that the assignees of the bankrupt never were possessed of any city lease of the property, but that the lease granted by the city was a demise of four houses (of which the property in question was one) for sixty-one years from *Midsummer*, 1828 (subject to a ground rent of considerably more than 15*l.* a-year), to one *George Longmore*, who underleased the property in question to *G. H. Malme*, who had underlet to the bankrupt. At the trial, a verdict was taken for the plaintiff for the amount of the check, and leave was given to the defendant to move to enter a verdict for the defendant, if the Court should be of opinion that the defence could be properly received in evidence upon the pleadings.

Chandless afterwards obtained a rule *nisi* to set aside the verdict for the plaintiff, and enter a verdict for the defendant; or that judgment might be entered for the defendant upon the facts found, pursuant to the 3 & 4 *W. 4*, c. 42; or that the defendant should be at liberty to amend, on payment of costs.

Erle and *Rawlinson* shewed cause.—First, the defendant's plea was not applicable to his defence. The rule is, that all matters in confession and avoidance which shew the transaction to be void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded.

PARKE, B.—It has been very common to plead generally that there was no consideration; but it is by no means to be taken for granted that any of those pleas

are good on demurrer. The instances given in the rule as to the mode of pleading, are, "bills or notes by way of accommodation," &c. There is no doubt that there was a wilful misrepresentation to enhance the value of the property.

Erle and Rawlinson.—The contract between an auctioneer and vendee was undoubtedly a good consideration for giving this check. The plaintiff was acting in the transaction merely as an agent, and is not responsible for his principal's acts.

PARKE, B.—In this case, he did not act under the principal. It is, at all events, a legal fraud. Upon the evidence, the auctioneer was the person to blame; and if the defendant had actually paid the money at the time the check became payable, he would have had a right to recover back the whole of the money; and he would have been at liberty to shew that the whole consideration failed by means of wilful misrepresentation, and to rescind the contract.

Erle and Rawlinson.—The plaintiff was taken by surprise, for, if he had been aware that the title would have come in question, he might have called for particulars of the objections on which the defendant relied, according to *Collett v. Thompson* (a) and *Todd v. Hoggart* (b). Secondly, this was not a case in which the Judge ought to have allowed an amendment upon section 23 of the 3 & 4 W. 4, c. 42, as that section only alludes to mistakes in setting out matters in pleading not material to the merits of the case; whereas, if this amendment had been allowed, the plaintiff would have been very much prejudiced.

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(b) 1 Moody & Mal. 128.

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Thesiger and *Chandless* in support of the rule.—There has been a total failure of consideration; and the distinction is now well established, that, where the consideration entirely fails, it is a defence to the action: *Spiller v. Westlake* (a). If there had been only a partial failure, it would have been no answer, *Moggridge v. Jones* (b), *Tye v. Gwynne* (c); and the only question is, whether it can be said that there was a consideration at any time for the check. Though the new rules give examples of pleas, they did not intend to specify every case. Where there is any fraud, moral or legal, there is no binding contract; and the defendant has a right to say that there was no legal contract. The check was given in a transaction in which the Jury have found that there was fraud, and that the fraud existed from the commencement.

PARKE, B.—If the declaration imports an immediate delivery, the plea is good; but the plaintiff might have been the fifth or sixth person to whom the check had passed. The declaration avers that the check was delivered to the plaintiff, but does not aver that the plaintiff was the bearer; and therefore, is it not incumbent on the plaintiff to prove that it was actually delivered to himself, to support this declaration?

Erle, contra, suggested that if there was a delivery to A. and several other persons afterwards, if the plaintiff was possessed of it at the time of action brought, it might be averred to be a delivery to him.

Thesiger and *Chandless* in support of the rule.—Prior to the new rules, the defence would certainly have been good under the general issue; and though those rules compel a

(a) 2 B. & Adol. 155.

(b) 3 Campb. 38.

(c) 2 Campb. 346.

defendant now to plead specially, no alteration has been made in the general rule of pleading, that matters may be pleaded according to their legal effect. Whatever consideration there might have been at the time of drawing the check, if the plaintiff would after payment have had a right to recover back the money, the rescission of the contract before action operated *ab initio*; and therefore the whole agreement was gone: *Butler v. Baker* (a). Secondly, the defendant ought to have been allowed to amend under the 23rd section of the 3 & 4 W. 4, c. 42: the words of that section are sufficiently comprehensive to comprise the present case. The 24th section, which enables the Court to give judgment according to the very right and justice of the case, notwithstanding any variance or mis-statement may be considered to apply only to such variations and mis-statements as are mentioned in the 23rd section; and the question therefore is, whether, if the amendment had been made in this case, the opposite party would have been prejudiced thereby. It is clear that the plaintiff came prepared to try the real question in dispute between the parties, for it appeared that he had taken the opinion of a pleader on the point, and was prepared with cases to shew that there was not a total failure of consideration, and that therefore he was entitled to recover.

PARKE, B.—The question is of very considerable importance, and has been very ably argued on both sides. The Court will therefore take time to consider of their judgment, in order that the question may be settled.

Upon the last day of this term, the Court gave the following judgment, which was delivered by—

PARKE, B.—This was an action against the defendant, as drawer of a check for 39*l.* 18*s.* on the Bank of *England*.

(a) 3 Co. 27, b.

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The plea was, that there was no consideration or value for the drawing of the said check. The replication was, that there was good consideration.

On the trial before me at *Guildhall*, it appeared that the check was given by the defendant for the payment of the deposit on a sale by auction of certain leasehold property by the plaintiff, as auctioneer, to the defendant; which property was mis-described in the particulars of sale by which the defendant bought. The conditions contained a clause that no error or mis-statement should vitiate the sale; but the jury found that the mis-description was wilful; and therefore the defendant had a right to repudiate the contract altogether, which he did; and having given orders to the Bank to dishonour his check, it was refused payment. It appeared to me at the trial, that the plea was not framed in the way it ought to have been, in order to meet the case, and I directed a verdict for the plaintiff, reserving to the defendant liberty to move to enter a verdict for him, and in the event of the Court being of opinion that the plea was not proved, the facts were to be considered as found specially, pursuant to the 3 & 4 *W. 4*, c. 42, s. 24.

A rule *nisi* having been obtained, cause was shewn last term, and the Court took time to consider their judgment.

It was argued by the learned counsel for the defendant, *first*, that by the old law, all facts must be pleaded according to their legal operation; and that the legal operation of the circumstances in evidence in this case is properly stated in the plea: and *secondly*, that the new rules have not made any difference in the principles and rules of pleading, except in those instances for which they have specially provided, and that either they have not provided any other mode of pleading in this case, or, if they have, the objection should have been taken on demurrer, and cannot now be available; and, upon consideration, we think the argument well-founded.

That all facts are to be pleaded according to their legal operation is clear, and the case cited on argument in *Butler v. Baker* (a) is a striking instance of the application of that rule, and affords a close analogy to the present. It is there said, that, if lands are given to a husband and wife, and the heir of the husband, or to their heirs, and afterwards the husband dies, the wife may waive the joint estate, and bring her writ of dower, and the husband be said, in pleading, to be sole seised *ab initio*, and the refusal shall have such relation in judgment of law, that the husband was sole seised *ab initio*.

In the present case, the check was given in lieu of money, as a deposit on a sale; the consideration for giving it by the defendant was the plaintiff's contract to sell leasehold property of a certain description; which property, in fact, he had not to sell; and therefore the defendant had a right to rescind the contract, and would have been entitled to recover back the deposit if it had been paid in cash, and of course, therefore, he may resist the payment of his check; and that on the ground that the contract which was the consideration having been done away with *ab initio*, no consideration in judgment of law existed at all.

But then, it may be said, that, as the defendant would have been bound by his contract if there had been any unintentional error or mis-statement, and could only rescind it on the ground that the mis-statement was wilful, and therefore of necessity fraudulent, the true nature of the defence was, that the transaction was void on the ground of fraud; and therefore, by article 3 of rule 1 of pleadings in *assumpsit*, should have been specially pleaded. If, however, this be such a case of fraud as falls within the rule (and we doubt if it be), the question is, whether the plaintiff can take advantage of the non-compliance with the rule in this stage: and we think he cannot. The check

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(a) 3 Coke, 27.

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has been in point of law given without consideration, although it is the plaintiff's fraud which has enabled the defendant so to treat it. The plea is therefore proved by the evidence, and that is the only point now to be decided.

The plea would no doubt have been bad on special demurrer; for, before the new rules, it would have amounted to the general issue, as being in truth no more than a denial of the implied allegation of consideration involved in that of drawing the check; and it was not authorized by the new rules, because they require some affirmative allegation; and the reason for so framing them was purposely to avoid any question as to the burthen of the issue on such a plea. In the recent case of *Easton v. Pratchett* (a), the Court intimated that a similar plea was good after verdict, though bad on demurrer: and still more recently, in the case of *Houghton v. Earl of Kilmorey* (b), the Court decided that such a plea was bad on special demurrer.

We are therefore of opinion that the rule must be made absolute to enter a verdict for the defendant.

Rule absolute accordingly.

(a) Ante, p. 472.

(b) Ante, p. 705.

HARVEY v. KING.

Proposed rule
as to demurrers
not intended for
argument.

THIS was a demurrer to a replication.—No one appearing in support of the plea, *Petersdorff* applied for judgment. It was understood that no argument was intended; but the paper books not having been delivered to the Judges, the Court refused to give judgment, and ordered it to be set down for the next paper day.

Lord ABINGER, C. B.—I think it would be better in

future, that, where a case is not intended to be argued, it should be mentioned to the officer, and that he should make out two lists, as there are in the *King's Bench*, one of those cases which are intended to be argued, and the other of those where no argument is intended; and that, as to the latter, the rule (a) respecting the delivery of paper books should not apply (b).

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- (a) R. G. 7 H. T. 4 Will. 4, such rule as that suggested by his
1834. Ante, Vol. 2, p. 305. Lordship has, as yet, been pro-
(b) It is understood that no mulgated.

SIMPSON v. DICK.

R. v. RICHARDS shewed cause against a rule which had been obtained by *Mansel* for discharging the defendant out of custody on entering an appearance, on account of a defect in the affidavit to hold to bail. The affidavit stated that the defendant was justly and truly indebted to the plaintiff upon a bill of exchange, which it described, and of which the defendant was the drawer, and it alleged that the whole amount thereof still remained due and owing to the deponent. No presentment of the bill for payment was alleged. He relied upon *Weedon v. Medley* (a), which was an action by the indorsee against the drawer; and the affidavit, after stating the acceptance of the bill, proceeded thus—"and which having become due is wholly unpaid." Here the words are nearly the same,— "and which sum still remains due and owing."

In an action by the indorsee against the drawer of a bill of exchange, the affidavit of debt alleged that the defendant was indebted to the plaintiff on the bill which was overdue, and that the money was still due and owing, but it omitted to aver either presentment or notice :—*Held*, bad.

PARKE, B.—This point was decided in a late case in the *Common Pleas*.

(a) Ante, Vol. 2, p. 689.

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Mansel.—In *Buckworth v. Levy* (a), which was followed by *Cross v. Morgan* (b) and *Banting v. Jadis* (c), in the *King's Bench*.

Richards.—It is expressly sworn that the defendant is indebted, which he could not be unless the bill was duly presented.

PARKE, B.—No indictment for perjury would lie on such an affidavit, for, it may be perfectly true, and yet the defendant may not be liable.

LORD ABINGER, C. B.—The allegation that the defendant is indebted, is merely a legal inference.

ALDERSON and GURNEY, Barons, concurred.

Rule absolute without costs, as an application had been made to a Judge at Chambers.

(a) 5 Moo. & Payne, 23; 7 Bing. 251; and ante, Vol. 1, p. 211.

(b) Ante, Vol. 1, p. 122.
 (c) Ib. 445.

LACEY v. UMBERS.

It is not a sufficient objection to a demurrer being argued, that the point intended to be raised is not stated in the margin of the demurrer. The rule only enables the opposite party to set aside the demurrer.

THIS was a demurrer to a plea.

White, who was in support of the plea, objected, that the demurrer could not be argued, because the point intended to be raised was not stated in the margin in pursuance of the new rules.

PARKE, B.—That is no objection to the demurrer being

argued: the effect of the rule is, that such a demurrer may be set aside as irregular.

Richards in support of the demurrer.

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SMITH v. SMITH and Another.

THIS was a rule which had been obtained by *Platt*, on behalf of the defendants, calling upon the plaintiff to shew cause why the defendants should not be allowed their costs under the 43 *Geo. 3*, c. 46, on the ground that the defendants had been arrested for 45*l.*, and that the plaintiff had recovered only 21*l.* It was an action for a tavern bill, including a sum of money paid to the defendants' use. At the trial before *Alderson*, B., the question turned principally upon the credit of a witness, upon the fact whether a particular sum of money had been paid by the plaintiff or not. The bill amounted to the sum of 24*l.*, from which the jury made a deduction of 3*l.*, and, with the exception of that deduction, the plaintiff would have recovered his whole demand, if they had credited the witness. The learned Baron reported that he should have been satisfied with the verdict either way.

Erle now shewed cause.—There is no denial throughout the defendants' affidavits that the debt was due to the plaintiff; on the contrary, there is the positive affidavit of the plaintiff, that the whole of the 45*l.* was due. The verdict of the jury is not conclusive. At the trial the principal question was, as to the joint liability of the two defendants. The defendants were brothers, and had been living together at the plaintiff's tavern. The jury may have considered that there was not sufficient evidence whereon to found a verdict against both the defendants for part

Two defendants having been arrested for a sum of 45*l.*, the plaintiff at the trial recovered only 21*l.* Part of the demand was for a sum of 19*l.* 10*s.*, which it was stated by a witness he had seen paid on a particular day, and a receipt was put in, from which it appeared that the money was paid on a former day. The jury, under the circumstances, disallowed that part of the plaintiff's demand, and also made a small deduction from the other part. It was not denied, however, by the defendants that the money was due, and it was positively sworn by the plaintiff that it was due from the defendants:—*Held*, that the defendant was not entitled to his costs under the 43 *Geo. 3*, c. 46.

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of the plaintiff's demand; but it by no means follows, that the whole of the amount claimed by the plaintiff was not fairly due to him, or that he had not reasonable and probable cause for arresting the defendants. The bill for 45*l.* had been delivered to the defendants; they left the tavern under pretence of getting money to pay the bill; they never made any objection on the ground that any part of the money was not due; and the plaintiff was obliged to have recourse to stratagem for the purpose of arresting them: and, as the Judge has reported that he should have been satisfied upon the evidence with the verdict either way, this cannot be considered to be a case within the act.

Platt in support of the rule.—The verdict of the jury is a safe criterion to go by. The plaintiff recovered less than half of the sum for which he arrested the defendant. The witness *Smith* must have been guilty of perjury; for, he swore that 19*l.* 10*s.*, part of the plaintiff's demand, had been paid by the plaintiff at the request of one of the defendants; that he saw it paid on the 23rd:—and when the receipt was put in, it was dated the 22nd. It was clearly proved, that the plaintiff must have known that this witness was giving false evidence. If there is a doubt about it, the verdict of the jury ought to turn the scale.

PARKE, B.—The only question is, whether there was reasonable or probable cause for the arrest; and I think it is not made out satisfactorily that the plaintiff had no right to arrest for the 19*l.* 10*s.* If it had been made out that the witness had been guilty of wilful perjury, and that the plaintiff knew of it, the defendant would have been entitled to costs; but the circumstances do not shew that that was necessarily the case. The payment might really have been made by the plaintiff to *Smith* the witness, and the receipt might afterwards have been fabricated. The jury

may not have been satisfied with the evidence as to this part of the demand. The plaintiff upon this occasion is not concluded by the verdict or the evidence; it is sufficient if he satisfies the Court by affidavit; and it now appears by the oaths of two persons, who have made affidavits since the trial, that the defendants had admitted that 45*l.* were due; and therefore, under these circumstances, and particularly as the Judge says he should have been satisfied if the verdict had been the other way, I think this rule should be discharged.

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BOLLAND, B.—I think the plaintiff has shewn sufficient reasonable and probable cause.

ALDERSON, B.—I am better satisfied with the verdict as it is, though I should not have been dissatisfied if the verdict had been the other way. The rule is, that the plaintiff must make out his case: in order to make it clearer, he took a receipt; and, in so doing, overreached himself. Under all the circumstances, I think this rule ought not to be made absolute.

Rule discharged.

BISHTON and Another v. EVANS.

DEBT on bond.—The declaration stated that the defendant heretofore, to wit, on &c., by his certain writing obliga-

In debt on bond conditioned to perform the covenants in an indenture, the

declaration set out the indenture with a covenant by which the defendant covenanted to pay 6000*l.* with 5*l. per cent.* interest on a particular day, clear of all taxes, &c. The breach alleged was, that the defendant did not pay the 6000*l.* on the day appointed, whereby the bond became forfeited. The defendant pleaded that he did pay on the day appointed the 6000*l.* with the interest due thereon, amounting to 6300*l.*, clear of all taxes, &c., according to the covenant. Upon a special demurrer to this plea, on the ground that it attempted to put in issue the fact of payment of the interest, and also that it concluded to the country:—*Held*, that the plea was bad.

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tory sealed with his seal, and now shewn to the Barons of His Majesty's *Exchequer* here, the date whereof is a certain day and year therein named, to wit, the day and year aforesaid, acknowledged himself to be held and firmly bound unto the plaintiffs in the sum of 12,000*l.* above demanded, to be paid to the plaintiffs or their certain attorney, executors, administrators, or assigns; that, under the said writing obligatory was written a certain *condition*, whereby it was recited that the plaintiffs had, on the day and year aforesaid, lent and advanced unto the therein above bounden defendant the sum of 6000*l.*; and that, by indenture of lease and release, the lease bearing date the day next before the day of the date of the release, and the release bearing or intended to bear even date with the said writing obligatory, and made or expressed to be made between the defendant of the one part, and the plaintiffs of the other part, the defendant had appointed, granted, and released, or otherwise assured, certain messuages, farms, lands, tenements, and hereditaments in the said release particularly described, unto the plaintiffs, their heirs and assigns, for ever, for securing the said sum of 6000*l.* and interest; but subject to a proviso for redemption of the same premises on payment by the defendant, his heirs, executors, administrators, or assigns, unto the plaintiffs, their executors, administrators, or assigns, of the said sum of 6000*l.* and interest, after the rate in the said release mentioned, on the 13th day of *November* then next ensuing the date thereof: and in which said condition it was further recited, that, for the better securing the payment of the same sum and interest unto the plaintiffs, the defendant had agreed to enter into the therein above written obligation, with such condition for making void the same as thereafter was contained; and the condition of the said writing obligatory was declared to be such, that, if the therein bounden defendant, his heirs, executors, administrators, or assigns did and should well and truly pay or cause to be paid unto the plaintiffs, their executors, ad-

ministrators, or assigns, the full and just sum of 6000*l.* of lawful money of *Great Britain*, with interest thenceforth for the same, after the rate of 5*l.* for every 100*l.* by the year, on the 13th day of *November* next ensuing the date of the said writing obligatory, being the same day and time as were covenanted in or by the said in part recited indenture of release for payment of the same, but subject to such proviso for the abatement of the interest as in such indenture of release contained, and did and should make the said payment without any deduction or abatement for or by reason of any taxes, charges, assessments, impositions, cause, matter, or thing whatsoever, and according to the true intent and meaning of the proviso and covenant in the said in part recited indenture of release contained; then the therein above written obligation should be void, or otherwise should remain in full force and effect; as by the said writing obligatory and the condition thereof will more fully and at large appear. And the plaintiffs further say, that, in and by the said proviso and covenant lastly above mentioned to have been contained in the said indenture, it was provided, that, if the defendant, his heirs, executors, administrators, or assigns, did and should well and truly pay or cause to be paid unto the plaintiffs or the survivor of them, his executors, administrators, or assigns, the full sum of 6000*l.* of lawful money of *Great Britain*, upon the 13th day of *November*, 1831, together with lawful interest for the same after the rate of 5*l.* for every 100*l.* by the year, without any deduction or abatement whatsoever out of the same principal sum and interest, or any part thereof, for or in respect or upon account of any matter, cause, or thing whatsoever, then and in such case, and upon and at any time after such payment as aforesaid, and on the request and at the costs and charges of the defendant, his heirs, executors, administrators, or assigns, they the plaintiffs, their heirs or assigns, should and would convey and assure the premises therein mentioned unto the defendant, his heirs or assigns, or

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unto such person or persons as he or they should direct or appoint, free and clear of and from all charges and incumbrances made, done, or committed by the plaintiffs, their heirs, executors, administrators, or assigns. And the defendant did, for himself, his heirs, executors, and administrators, covenant, promise, and agree, to and with the plaintiffs, their executors, administrators, and assigns, that he the defendant, his heirs, executors, administrators, and assigns, or some or one of them, should and would well and truly pay or cause to be paid unto the said plaintiff, their executors, administrators, or assigns, the said principal sum of 6000*l.* and the interest thereof at the rate aforesaid and at the time in the said indenture before appointed for the payment thereof, without any deduction or abatement for or in respect of any present or future taxes, rates, assessments, charges, causes, matters, or things whatsoever, and according to the true intent and meaning of the said indenture; that the said proviso for the abatement of interest mentioned and referred to in the said condition was and is a certain proviso in the said indenture of release therein also mentioned, by which it was provided, and by which the plaintiffs, for themselves, their heirs, executors, and administrators, did covenant, declare and agree to and with the defendant, his heirs, executors, administrators, and assigns, that, if the said defendant, his heirs, executors, administrators, or assigns, did or should so long as the said principal sum of 6000*l.* or any part thereof should remain due upon the then present security, well and truly pay, or cause to be paid, unto the plaintiffs, their executors, administrators, or assigns, interest for the said sum of 6000*l.* after the rate of 4*l.* for every 100*l.* by the year, by equal half yearly payments, on the 13th day of *May* and the 13th day of *November* in each year, or within two calendar months after each or either of the said days respectively, then and in such case, but not otherwise, they the said plaintiffs, their executors, admin-

istrators, and assigns, should and would accept and take the same in lieu of and in full satisfaction for interest on the said sum of 6000*l.*, after the rate of 5*l.* *per cent. per annum* thereinbefore covenanted to be paid for the same; and should and would (if required) from time to time give proper and sufficient discharges for the same interest at 5*l.* *per cent.* accordingly, anything in the said indenture before contained to the contrary notwithstanding; as in and by the said indenture, which said indenture sealed with the seal of the defendant, the date whereof is the day and year hereinbefore in that behalf mentioned, the plaintiffs now bring here into Court, reference being thereunto had, will more fully appear. Breach—that the defendant did not well and truly pay or cause to be paid unto the plaintiffs or either of them the said sum of 6000*l.* or any part thereof on the said 13th day of *November* 1831, but therein made default; and by reason of the breach of the said condition the said writing obligatory became forfeited, and thereby an action had accrued to the plaintiffs to demand from the defendant the sum of 12,000*l.* above demanded: yet the defendant (although often requested so to do) had not as yet paid any part of the said last-mentioned sum, but the same was still wholly due—to the plaintiffs' damage of 1000*l.*, and therefore &c.

Plea.—The defendant says that he the defendant did pay unto the plaintiffs the full and just sum of 6000*l.* of lawful money of *Great Britain*, with interest for the same from the date of the said writing obligatory until the day next hereinafter mentioned, after the rate of 5*l.* for every 100*l.* by the year, on the said 13th day of *November* next ensuing the date of the said writing obligatory, and which was in the year of our Lord 1831; which said sum of 6000*l.* with interest, as in this plea aforesaid, then amounted to a large sum of money, to wit, the sum of 6300*l.* of like money; and that he the defendant then made the said

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payment without any deduction or abatement for or by reason of any taxes, charges, assessments, impositions, cause, matter, or thing whatsoever, and according to the true intent and meaning of the proviso and covenant in the said indenture in the said condition in part recited contained, and according to the form, tenor, and effect of the said condition under the said writing obligatory written as in the said declaration is mentioned. And of this the defendant puts himself upon the country &c.

Demurrer.—And the plaintiff saith that the plea of the defendant is not sufficient in law, and he states to the Court here the following causes of demurrer; that the said plea offers to put in issue and to affirm a matter not denied by the plaintiffs, namely, the payment of interest to the 13th day of *November*, 1831, on the said bond in the declaration mentioned; whereas the declaration admits the payment of the interest in the said plea mentioned, and states only the nonpayment of the principal sum; and the plaintiffs therefore cannot safely join issue on the said plea: and for that, by offering to put in issue the payment of interest which is admitted, it tenders an immaterial issue, and the traverse is thereby too large: and the said plea is otherwise informal.

Joinder in demurrer.

John Jervis, in support of the demurrer, contended that the traverse was too large, and that the plaintiff could not safely take issue upon it; and that, at all events, the plea having introduced a new matter not contained in the breach, ought to have concluded with a verification.

Cowling, contra.—The conclusion to the country is proper, according to *Skinner v. Kilby* (a), and the plaintiff might

(a) Carth. 87.

have added the *similiter*, and gone to trial; and, as the breach was only upon the nonpayment of the principal, the parties would have gone to trial on that issue only. But the plea is proper, because, by the terms of the covenant, the defendant was to pay the principal and interest without deduction on a certain day; and he pleads in the words of the covenant that he paid both; the major proposition therefore, that he paid both, must necessarily include the minor, that he paid the principal. It might be contended, perhaps, that the declaration was bad, because it ought to have shewn a breach in the words of the covenant; and, if the interest was paid, it ought to have been mentioned in the breach, that, though the interest was paid, yet the defendant did not pay the principal: *Hunt v. Brains* (a); because the plaintiff has no right to divide his cause of action, so as to make several actions. But, if it is to be assumed upon the declaration that the interest has been paid, then the plea cannot embarrass the plaintiff; because if either the principal or interest has not been paid, the issue must be found for him. The plea is properly pleaded in the words of the covenant (b).

Jervis, in reply, contended, that, though the plea would have been good if the plaintiff had replied to it, yet that it was bad upon special demurrer; and he cited *Williams's Saunders*, 312, n. 4, to shew that the traverse must follow the declaration.

LORD ABINGER, C. B.—If the declaration had alleged, that, though the defendant had paid the interest, yet he had not paid the principal, then the plea of payment of principal and interest would have been good. I have some doubt whether the plea is not good as it is. If it involves some matter which would tend to perplex and embarrass

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(a) 4 Mod. 402.

(b) *Scudamore v. Stratton*, 1 Bos. & P. 455.

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the plaintiff, that is a good reason why it should not be allowed; but I do not exactly see how the plaintiff could be embarrassed by it. As the majority of the Court, however, are of opinion that the plea is bad, the judgment must be for the plaintiff.

PARKE, B.—I think the plaintiff might have safely joined issue on this plea. The action is on a bond conditioned to perform a covenant for the payment of principal and interest on a particular day. The plaintiff might have relied upon the bond only, but he chooses to state the indenture, and assign the breach in the declaration. It appears to me that that makes all the difference. The breach is for the nonpayment of 6000*l.* at a particular day, but it says nothing of interest; and for the purpose of the cause, it must be supposed that there was no other breach than that of the nonpayment of the principal, and that, for the purpose of this action, the plaintiff admits the payment of interest. The plea is not a plea of performance. The plea ought to have been only on the issue tendered on the other side, whether a positive or negative averment, and include nothing else, and conclude to the country; but it goes a great deal farther. It avers that the defendant paid on the 13th of *November*, the 6000*l.*, with interest at the rate of 5*l. per cent.*, amounting together to the sum of 6300*l.*, and that he made the same without any deduction or abatement, by reason of taxes or otherwise, according to the true intent of the covenant in the indenture, and of the condition of the bond, and then concludes to the country; therefore it proposes to include a fact to which there is no corresponding averment; and on that ground I think upon special demurrer the plea is bad in form, though in substance it is good.

BOLLAND.—I think the plea is bad on special demurrer.

ALDERSON, B.—The plaintiff is embarrassed, because the defendant has thought proper not to adhere to the simple rule of pleading.

Judgment for the plaintiff (a).

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(a) Vide *Price v. Brown*, Str. 690. 1 Wils. 116. S. C.

GOODALL v. ENSELL.

THIS was an action on the case for slander, and at the Assizes the plaintiff recovered a verdict for 20*s.* The plaintiff afterwards applied to the learned Judge, who certified to give the plaintiff full costs. No special damage was laid in the declaration; there was merely the general damage that the plaintiff had lost divers great gains and profits: the words were alleged to have been spoken of the plaintiff in his business of a schoolmaster, and were only actionable upon the supposition that they were so spoken: they imputed insolvency and drunkenness to the plaintiff, and recommended the person to whom they were spoken not to go into partnership with the plaintiff, as he would bring him into difficulties. The Master, on taxing costs, taxed the full costs to the plaintiff.

In an action on the case for words spoken of the plaintiff as a schoolmaster, without an allegation of special damage, the jury found a verdict for twenty shillings damages only, but the judge certified to give the plaintiff full costs:—*Held*, that he had no power to do so; and the Master, having in consequence of the certificate, taxed to the plaintiff his full costs, was ordered to review his taxation.

Mellor obtained a rule *nisi* for reviewing the Master's taxation, on the ground that the plaintiff, having recovered less than 40*s.*, was entitled to no more costs than damages, under the 21 *Jac.* 1, c. 16, s. 6, and that the 22 & 23 *Car.* 2, c. 9, did not extend to enable a Judge to certify in an action like the present.

Adams, Serjt. shewed cause.

PARKE, B.—A Judge has no power to certify to give costs in a case of slander. The Master therefore must

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réview his taxation by reducing the costs to the amount of the damages.

The other Barons concurred.

Rule absolute for reviewing the Master's taxation (a).

(a) Vide *Turner v. Horton*, 2 Nev. & Man. 460; *Willes*, 438; *Grenfell v. Pierson*, 5 B. & Ad. 645. ante, Vol. 1, p. 406; *Kelly v. Par-*

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Where upon the taxation of an attorney's bill, a sum was deducted, being the costs occasioned by commencing an action in an improper form, which was afterwards brought in a proper form, and in consequence of that deduction a little more than a sixth was taken off:—*Held*, that the client was entitled to the costs of taxation.

DOWLING moved that the costs of taxing a bill of costs might be taxed to the plaintiffs, on the ground that more than one sixth had been taken off on taxation. A similar application had been already heard before Mr. Baron Gurney, at chambers, and *White v. Milner* (a) was cited to his Lordship as an authority to shew that the attorney was not liable to pay the costs of taxation, because, as it was alleged, a particular branch of the bill had been struck out entirely, and that it was not reduced on a general taxation, and also that there were three bills delivered, and only one was reduced by one sixth (b). He contended, that he was entitled to a rule as of course, for

(a) 2 H. Bla. 358.

(b) Another objection was also made at chambers, that an action had been commenced to recover the amount of the bill before the summons to tax was taken out, and a writ issued in the borough Court of *Liverpool* was produced: but the learned Judge looking upon this as a trick upon the client, (the application to tax having been made within a month

from the obtaining of all the bills), overruled the objection. See as to this, *Toomer v. Fuller*, ante, Vol. 1, p. 195; and *Featherstonehaugh v. Reece*, *Ib.* p. 30. The Master (*Walker*) was of opinion, that though more than one sixth was taken off, he could not allow the plaintiff the costs of taxation without a Baron's order for that purpose being first obtained.

the allocatur was binding on both parties; and as long as it remained unimpeached, the general rule applied, that where more than one sixth is taken off, the attorney is liable to pay to the client the costs of taxation. The attorney should have applied to have the Master's taxation reviewed if he conceived it erroneous.

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Chilton shewed cause in the first instance.—From the affidavits, it appears that the amount of the three bills taxed was 282*l.* 16*s.* 6*d.* and the amount taxed off was 48*l.* 2*s.* 11*d.*, being an excess of 1*l.* 3*s.* 2*d.* only. This was occasioned by striking out a whole branch of the bill amounting to 8*l.* 15*s.* 8*d.*, and for which the Master thought that the client was not responsible: this sum was made up of charges incurred in the course of an action which was afterwards discontinued in consequence of its having been discovered to have been brought in the wrong form; a new action having been afterwards commenced by Mr. *Cross* in the proper form. *White v. Milner* is an authority expressly in point: it was there held that an attorney is not liable to pay the costs of taxing the bill under the 2 *Geo. 2*, c. 23, s. 23, where the deduction of one sixth is occasioned not by particular items being taxed off, but by a whole branch of it being disallowed. There, the prothonotary on taxation thought that the defendant was not properly charged with the costs of defending two actions for a third person, and therefore struck out the whole of those costs; and the Court said that the statute only applied where an attorney made exorbitant charges on his client in the particulars of his bill, and the foundation of the demand was not denied, but only the amount of it; and that the costs of those two actions were not struck out because the items were objectionable, but because it could not be proved that the defendant was liable to pay them. So, in *Mills v. Rabbitt* (a), the Court refused to require an

(a) 3 Nev. & M. 767.

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attorney to pay the costs of taxation, where the Master disallowed one of the bills delivered, on the ground of nonliability. In that case, *Taunton, J.*, observed that *White v. Milner* was in point, and that nothing could be said in disparagement of that case, except that no other could be found, the reason of which simply was, that it had never been disputed. Secondly, the costs of the taxation of two of the bills ought to be allowed to the attorney, because it was only on the third bill that one sixth was taken off.

Dowling, in reply, cited *Dickens v. Woolcott (a)*, where a motion was made to review the taxation of the Master, who had allowed to the client the costs of taxation, more than one sixth being taken off, on affidavits shewing the reasonableness of the charges which had been disallowed; and the Court there held that the bill having been reduced by taxation more than one sixth, they had no discretion in the matter, but must comply with the express language of the statute. So, in *Ellwood v. Pearce (b)*, where an attorney's bill was reduced nearly one sixth, the Court refused to allow him the costs of taxation. The same point was determined in *Baker v. Mills (c)*, in this Court, where a large sum having been taken off the bill, though it was less than one sixth, the Court refused to allow the attorney the costs of taxation; *Bayley, B.*, observing, that, where one sixth is taken off, the statute is imperative, and that the attorney must pay the costs of taxation, but, where less than one sixth is taken off, it is discretionary with the Court to allow the costs of taxation or not. With respect to there being three bills, no point can be made of that, because they were all referred together and taxed together, and ought therefore to be treated as one bill.

(a) 8 D. & R. 589; 5 B. & C. 760, S. C. & Scott, 159; 8 Bing. 83, S. C.

(c) Ante, Vol. 2, p. 382.

(b) Ante, Vol. 1, p. 251; 1 Moore

LORD ABINGER, C. B.—The language of modern cases appears to be different from that used in *White v. Milner*, and it would be pushing that case beyond what it really warrants, if we were to hold that it applied to the present case; here the attorney has made charges which he had no right to make, and which have been taxed off in the usual way. If we were to allow the attorney his costs in the present case, we should be inviting a discussion in every case that occurs, upon the question whether the attorney or the client is to have the costs.

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PARKE, B.—The Master says that all the three bills were treated as one, and taxed together. Upon the other question, it is unnecessary to say whether the case of *White v. Milner* is right or wrong. If an attorney puts a disputable item into his bill, he takes the chance whether it will be allowed or not, and must abide by the consequences. *White v. Milner* is a very different case from the present; there, the attorney improperly sought to charge the client with the costs of certain actions, without being able to satisfy the Master that the client was chargeable for them. The charges were not improper, but they were chargeable to some one else. Here, the charges were not only improper as against the client, but they were improper against any body, as they were occasioned entirely through the fault of the attorney; and no one being liable for them, they are like any other overcharge disallowed by the Master.

BOLLAND, B.—There was a case where a client had paid to his attorney a sum of money on account of counsel's fees, and it was held that the attorney might properly make it part of his bill; but, in a late case in this Court, where an attorney had received a sum specifically to pay the debt and costs in an action, and made it part of his bill, the Master struck it out, and thereby reduced the bill

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more than a sixth, and the Court thought that it was improperly made part of the bill, and held that the attorney was not entitled to the costs of the taxation (a).

Rule absolute with costs.

(a) *Woollison v. Hodgson*, ante, Vol. 2, p. 360.

PERCIVAL and Others v. FRAMPLIN.

In an action by the indorsee against the indorser of a promissory note for 500*l.*, the defendant pleaded as to 300*l.*, that the note was indorsed by the defendant for the accommodation of the maker, and as a security to the plaintiffs, who were the maker's bankers, for subsequent advances, and that only 200*l.* was subsequently advanced, and that therefore, as to 300*l.*, there was no consideration. The plaintiffs replied that they were holders of the note for value given to the drawer to the full amount:—*Held*, that upon this issue it was not incumbent on the plaintiff to give any evidence, unless his title was impeached by the defendant, and that he was entitled to recover the whole amount of the bill.

ACTION by the indorsees against the indorser of a promissory note for 500*l.*, made by one *Atcheson*, and payable to the defendant, and by him indorsed to the plaintiffs.

Plea—As to the whole, except so far as relates to part, to wit, 200*l.* of the amount expressed in the note, that *Atcheson* made and delivered the note to the defendant, as in the declaration mentioned, for the purpose of being indorsed by the defendant to the plaintiffs as a security to the plaintiffs for sums to be thereafter advanced by them to *Atcheson* on the security of the note, and without any other purpose or consideration whatever; that the defendant indorsed the bill to the plaintiffs for the purpose and object aforesaid, and without any other purpose or consideration whatever; that, after such indorsement, the plaintiffs advanced to *Atcheson* sums amounting to part, to wit, 200*l.*, and, save and except the sums so advanced, there was no consideration whatever for or in respect of their being holders of the said note, or to entitle them to the security thereof.

Replication—That the plaintiffs before and at the said time when &c. were and still are holders of the said note for good and valuable consideration by them given to *Atcheson*, for and in respect of their being holders of the note, to a much larger amount &c., to wit, to the amount of the 500*l.*

The action was tried before *Gurney, B.*, at the *London* sittings at *Guildhall*.

Kelly, in opening, said, he was not bound to give any evidence of consideration, but would put a witness into the box to shew the state of the account between *Atcheson* and the plaintiffs who were his bankers. A clerk of the plaintiffs accordingly stated that they had discounted the note for *Atcheson*; that at that time there was a balance to an amount exceeding the 500*l.*, due from *Atcheson* to the plaintiffs, and that since then advances had been made by the plaintiffs to *Atcheson* to the amount of 183*l.* 1*s.* 6*d.* On cross-examination, it appeared that the discounting consisted only of placing the amount of the note to the credit of *Atcheson*, and debiting him with the discount and expenses (so that in effect the note was applied in diminution of the old balance), and that the clerk had no personal knowledge of the pecuniary transactions between *Atcheson* and the plaintiffs, and spoke only from the entries in his employers' books. It was objected by *J. Henderson*, for the defendant, that this was not evidence; but the learned Baron held that no evidence was necessary. It was then contended, that the evidence given shewed that, except as to the 183*l.* 1*s.* 6*d.*, there was no consideration consistent with the facts admitted on the pleadings. This objection was also overruled, and the plaintiff obtained a verdict for 500*l.*

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Henderson now moved for a new trial, on the ground of misdirection, and renewed the former objections. He urged, that, it being admitted that the defendant received and indorsed the note for accommodation, and that he got nothing from the plaintiffs for it, the plaintiffs were bound to prove that consideration which they had undertaken to prove, viz. consideration to *Atcheson*; the presumption of law being that the indorsee gave value to

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the indorser, not to the maker, with whom he had no privity. Secondly, he contended, that there was no evidence to shew that any advance was made subsequently to receiving the note, beyond the 1834; and that therefore, upon the pleadings, the plaintiffs were at most only entitled to recover that sum.

PARKE, B.—I am of opinion that no rule ought to be granted. Where a bill is proved to have been obtained by fraud, you may call on the indorsee to prove a consideration; but not upon a mere allegation that it was an accommodation bill: that raises no presumption that the bill came improperly into the plaintiffs' hands, but rather the contrary; and therefore I think the learned Judge was quite right in holding that the plaintiff was not bound to prove that he gave value, unless the defendant first gave evidence impeaching the plaintiffs' title. This bill was proved to have been discounted by the plaintiffs, and there was no proof of any notice to the plaintiffs that the bill was given only for future advances; and therefore, in the absence of such notice, the balance already due was a good consideration for the indorsement.

ALDERSON, B.—The mere fact of a bill or note being given for accommodation does not raise any presumption against the holder's right to recover.

The other Barons concurred.

Rule refused.

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MASTERS v. BILLING.

HUMFREY moved that the bail-bond given by the defendant in this action, might be delivered up to be cancelled upon entering a common appearance. The affidavit of debt stated that the defendant was indebted to the plaintiff in 500*l.*, upon a certain indenture of mortgage, by which the defendant covenanted to pay the said sum of money to the plaintiff at a day now past, and that no offer had been made to pay in any note or notes of the Bank of *England*. He contended that it ought to have gone on to deny that the money was duly paid at the day appointed.

An affidavit of debt, that the defendant is indebted upon and by virtue of a mortgage deed in the sum of 500*l.*, by which the defendant covenanted to pay that sum at a certain day now past, is sufficient, without averring that the money was not paid at the appointed day.

ALDERSON, B.—I think the affidavit is sufficient. The affidavit states, that the defendant is indebted, which he could not be unless the money was not paid at the day.

Rule refused.

GOODENOUGH v. BUTLER.

THIS cause was tried before the under-sheriff, and the verdict was for the defendant, subject to a motion to enter a verdict for the plaintiff. The plaintiff took out a rule to discontinue. *Knowles* having obtained a rule *nisi* to set aside that rule,

The plaintiff cannot discontinue after a verdict for the defendant with leave to the plaintiff to enter a verdict for himself.

Humfrey shewed cause, and contended that the discontinuance was regular. He relied on *Sweeting v. Halse* (a), and *Jackson v. Hallam* (b). In *Price v. Parker* (c), a discontinuance was allowed to be entered after a special

(a) 4 Man. & Ry1. 544; 9 B. & Rep. 19, S. C.
C. 369.

(c) 1 Salk. 178.

(b) 2 B. & Ald. 317; 1 Chitty

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verdict. He also cited a case of *Lewis v. Bates*, where the Master taxed the costs on a discontinuance in this form, and no objection was made to it.

PARKE, B.—It is expressly laid down in *Mr. Tidd's Practice*, that a rule to discontinue is never granted after a general verdict; and after a special verdict, the plaintiff can only discontinue by leave of the Court, because that is not complete and final. If this proceeding were allowable, the numerous applications which have been made by plaintiffs for entering nonsuits have been wholly unnecessary.

Lord ABINGER, C. B.—There are many reasons why it should not be allowed. The rule must be absolute.

Rule absolute.

CRISP v. GRIFFITHS

To an action on a promissory note by the payee against the maker, the defendant pleaded, that, after the accruing of the cause of action to the plaintiff, he drew on the defendant a bill of exchange for a larger amount, for and on account of the said note, which the defendant accepted and delivered to the plaintiff, who took it on account of the said note:—*Held*, that this plea was bad, as well because it did not aver that the bill was accepted or delivered by the defendant on account of the previous note, as also that it did not shew that it was given or received in satisfaction.

DEBT on a promissory note.—The declaration alleged that the defendant on the 31st day of *July*, 1834, made his promissory note in writing, and delivered the same to the plaintiff, and thereby promised to pay to the plaintiff or order, at Messrs. *Farley & Co.*, bankers, *Worcester*, the sum of 12*l.* for value received, two months after the date

To the above plea, the plaintiff replied that the defendant neglected to pay the note of his own wrong, and without the cause alleged in the plea. To which the defendant demurred, assigning for special cause, that it was multifarious, and too general, and not proper in an action on promises.

Semble, that this replication (if properly pleadable under any circumstances in such an action as the present) was bad in this instance, as being inapplicable to the plea, and therefore not putting the matters of the plea in issue; for the plea did not shew any cause for not breaking the promise in the declaration, but merely stated a matter which had occurred subsequently, shewing that the plaintiff's right of action was suspended or transferred.

thereof, which period has now elapsed; by reason of which said last-mentioned premises the defendant became liable to pay to the plaintiff the amount of the said note, according to the tenor and effect thereof; yet the defendant hath not paid to the plaintiff the said sum of money in the said promissory note specified, although the same on the day when it became due, to wit, on the 3rd day of *October*, in the year aforesaid, was duly presented for payment thereof, at Messrs. *Farley & Co.*, bankers, *Worcester*, and payment thereof was then and there duly demanded, according to the tenor and effect of the said promissory note: whereby and by reason of the nonpayment of the said sum of money in the said promissory note specified, an action hath accrued to the said plaintiff to demand and have of and from the said defendant the said sum of money above mentioned.

Plea—The defendant says, that after the making of the said promissory note and accruing of the said supposed debt in respect of the same, to wit, on the 10th day of *August*, 1834, the plaintiff drew his bill of exchange upon the defendant, and thereby requested the defendant to pay to the plaintiff's order 25*l.* as for value received, at a certain period after the date thereof, and which period hath long since before the commencement of this suit elapsed, for and on account of the said promissory note, and the defendant then accepted the same and delivered it to the plaintiff, who then took it for and on account of the said promissory note; and the plaintiff afterwards and before the commencement of this suit, to wit, on the day and year last aforesaid, indorsed and delivered the said bill of exchange so accepted by the defendant as aforesaid, to a certain person, to the defendant as yet unknown, and who and not the plaintiff, at the time of the commencement of this suit was and still is the holder thereof, and entitled to sue the defendant thereon; and this the defendant is ready to verify, &c.

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Replication—The said plaintiff says, that the said defendant of his own wrong, and without the cause in his said last-mentioned plea alleged, neglected to pay the amount of the said note in the said first count of the said declaration mentioned, in manner and form as the said plaintiff hath above complained; and this he prays may be inquired of by the country.

Demurrer—assigning specially the following causes of demurrer. The defendant says that the said replication, instead of the general denial therein contained, ought to have traversed or denied, or confessed and avoided some one or more of the facts stated in the said plea in express words, and also, that the general replication *de injuria* is not the proper replication in an action on promises, and also, for that the said replication is too large and general, and in other respects bad and insufficient, &c.

Joinder in demurrer.

Hunfrey in support of the demurrer.—This replication puts in issue, that the defendant accepted a bill, that the plaintiff took it on account of the promissory note, and that the bill was delivered to a third person who had a right to sue upon it. This is a novel attempt to put the whole plea in issue, contrary to the general rule, that issue ought to be taken upon some one single point: this is not a case where several facts go to make up one issue.

LORD ABINGER, C. B.—The plea does not shew an extinction of the debt, but only a suspension of the remedy: the question is, whether the whole amounts to mere matter of excuse, or whether a matter of right is set up.

PARKE, B.—It is rather a transfer of the right to sue. The question is, whether it can be said that all these matters compose one entire defence. Certainly, under the

old form of pleading, no such replications were in use, though there were frequently special pleas.

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Humfrey.—This is the common case of the renewal of a bill. If the acceptor prevails on the holder to take a new bill, his right is suspended till he has failed to pay the latter bill when due. The replication puts in issue more facts than are necessary, to shew the plaintiff's right to support his action: any one of the three principal facts stated in the plea might have been put in issue, and would have been an answer. If this replication is allowed, it will do away with the good effect of the new rules, because instead of the cause being brought to a single point it will leave it at large as it was before.

W. H. Watson in support of the replication.—The plea contains mere matter of excuse: at the most, it shews a mere suspension of the remedy. The rule respecting the general replication *de injuriâ* is, that where mere matter of excuse is pleaded, such a replication is sufficient.

PARKE, B.—There are three cases where *de injuriâ* would not be a good replication:—*first*, where matter of record is relied on; *secondly*, where the defendant by his plea claims an interest; and *thirdly*, where the defendant derives authority immediately from the plaintiff. That is the rule laid down in *Crogate's case* (a). The third instance given is the only one which can apply to the present case: the plea here is similar to that which was demurred to in *Kearslake v. Morgan* (b). There, the security of a third person was given: the plea was that the defendant indorsed to the plaintiff a promissory note, drawn by *W. Pearce*, in favour of the plaintiff, and that the plaintiff accepted and received it on account of the debt.

(a) 8 Coke, 666.

(b) 5 T. R. 513.

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There was another case in this Court of a blank acceptance given, and it was held that the remedy was suspended (a). Here, the bill was overdue, and therefore the indorsement over was essential to the plea, as the action was only suspended during the running of the bill.

W. H. Watson.—In *Kearslake v. Morgan*, there was no indorsement over. The general replications to pleas like the present, of bills given, have been, that they were not paid. This replication is not altogether a novelty, as it has been adopted on several occasions. In *Rickards v. Murdock* (b), to an action of covenant on a policy of insurance, the defendant pleaded a very special plea, containing a great number of facts, to shew that there had been an improper concealment by the insured from the underwriters; and the replication there was, that the defendants of their own wrong, and without the cause alleged, committed the breach of covenant complained of; and no objection was taken to it. There was another case which occurred in this Court during the term, where there was a similiar replication (c): neither is the replication double within the meaning of the rule which forbids duplicity. In *Carr v. Hinchliff* (d), to assumpsit for goods sold, the defendant pleaded that the goods were sold and delivered to the defendant by A., the factor and agent of the plaintiff, with the privity of the plaintiff, as and for the goods of A., and that the defendant did not know that the goods were not the property of A.; that, at the time of the sale and delivery, A. was and still is indebted to the defendant in more than the value of the goods; and that the defendant was ready and willing to set off and allow to the plaintiff the value of the goods out of the monies so due and owing

(a) *Simons v. Lloyd*, post.

(b) 10 B. & C. 527.

(c) *Solly v. Neish*, post. This case was argued in the term, but

judgment was not given till *Trinity Term*.

(d) 7 Dowl. & Ryl. 42; 4 B. & C. 547.

from *A.*, and it was held, on special demurrer, that the plea was good. Mr. Baron *Bayley*, in his judgment, says, "it has been urged, that the plea imposes a hardship upon the plaintiff, as it compels him to admit one half of the defendant's case; supposing it to be so, that cannot be adopted by the Court as a ground for saying that the plea is bad; but I am not prepared to say that the plaintiff might not have framed his replication so as to put in issue both the sale by the factor as alleged in the plea and the debt stated to be due from him to the defendant: those two facts constitute one matter of defence; and the replication suggested might probably be supported by the cases of *Robinson v. Rayley* (a), and *O'Brien v. Saxon* (b). But upon this point it is unnecessary to decide, and I do not profess to give any decided opinion." In *O'Brien v. Saxon*, to a declaration for maliciously and without reasonable cause suing out a commission of bankrupt, the plea alleged the plaintiff's trading and act of bankruptcy, and the petitioning creditor's debt; and that therefore the defendants sued out the commission of bankrupt; and the general replication *de injuriâ* was held to be sufficient upon a demurrer for duplicity. The Court there say, "These three facts stated in the plea, connected together, constitute but one entire proposition, and therefore the replication is good. In *Crogate's case* (c), it is laid down that the general replication *de injuriâ sua propriâ* is proper, when the defendant's plea consists of matter of excuse, and of no matter of interest whatever. Here the plea consists of matter of excuse only. In *Robinson v. Rayley* (d), the defendant in trespass pleaded a right of common for his cattle levant and couchant. The plaintiff replied that they were not his own commonable cattle, levant and couchant. The defendant demurred specially,

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(a) 1 Burr. 316.

(c) 8 Coke, 132.

(b) 4 Dowl. & Ryl. 579; 2 B. &

(d) 1 Burr. 316.

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because the replication was multifarious; but the Court held the replication good, the rule being not that issue must be joined on a single fact, but on a single point, and that it was not necessary that this single point should consist only of a single fact; and Lord *Mansfield* says, 'here the point is, the cattle being entitled to common: this is the single point of the defence; but in fact, they must be both his own cattle, and also levant and couchant, which are two different essential circumstances of their being entitled to common, and both of them absolutely requisite:' so in this case the point is, whether the plaintiff duly became bankrupt; and in order to establish that, there must be a trading, an act of bankruptcy, and a good petitioning creditor's debt; and these three circumstances are essential to constitute him a bankrupt."

In the late case of *Selby v. Bardons* (a), this question was very much discussed, and from the opinions given by *Parke, J.*, and *Patteson, J.*, it is to be collected that "however numerous the facts stated in the plea may be, if the plea is properly pleaded, and all the facts are so combined together as to constitute only one cause of defence, the general replication of *de injuriâ* is sufficient; and *Tindal, C. J.* (b), in giving the judgment of the *Exchequer Chamber*, expressly says, that the meaning of multiplicity in *Crogate's case* could not be considered to forbid the including in one issue several separate and distinct facts if they constitute one defence: and that by multiplicity in a replication must be understood, where it contains two answers to the plea." This is not a case of licence or authority within the meaning of *Crogate's case*; and interest in land is out of the question. The plea contains matter of excuse; and according to *Barnes v. Hunt* (c), a replica-

(a) 3 B. & Adol. 2: affirmed on error, 3 Moo. & Sc. 280; 9 Bing. 756.

(b) 9 Bing. 764; 3 Moo. & Sc. 290.

(c) 11 East, 455.

tion of *de injurid* merely puts in issue the cause, which is one combined thing, arising out of several facts.

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ALDERSON, B.—What cause is there stated in the plea for the breach of promise charged in the declaration? The plea admits the breach, but says, that afterwards, the plaintiff indorsed away a bill, by which he is precluded either for a time or altogether from bringing the action?

PARKE, B.—The two questions are, *first*, whether you can put all these matters in issue, and *secondly* whether it can be done in this way?—There is nothing alleged in the plea, as cause for omitting to perform the promise stated in the declaration. The matters stated in the plea are not alleged in excuse for breaking the promise, but they are alleged as accord and satisfaction; in fact, there is no excuse or defence to the original breach. The plea only amounts to accord and satisfaction up to the time that the renewed bill becomes due, or is given up.

LORD ABINGER, C. B.—I doubt whether the *plea* is good in form; for it does not say that the bill was given on account of the former note, but only that the plaintiff took it on account of the note.

PARKE, B.—A second bill ought to be given as well as received on account of a former bill; and there is no averment here that the bill was given in satisfaction, nor any thing equivalent to it (a).

W. H. Watson, in support of this last objection, referred to *Webb v. Weatherby* (b), in which *Young v. Rudd* (c)

(a) See *Frederick v. Gosfright*, Carth. 238, 347; *Trevanion v. Panhallow*, Sty. 452, acc.

(b) 1 Bing. N. S. 502.

(c) 5 Mod. 86.

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was cited, and in which it was held, that the plaintiff might traverse either the giving in satisfaction, or the acceptance in satisfaction; which shewed that both were material.

Humfrey, in support of the plea, contended that the averment in the plea, that the bill was drawn on the defendant on account of the note, and that he accepted it and delivered it to the plaintiff, must be taken to amount to an allegation, that it was given by the defendant on account of the note. In *Webb v. Weatherby, Tindal, C. J.*, says, "where a creditor receives without objection what is offered by his debtor, *solvitur in modum solventis*, and it must be implied that the debtor paid it in satisfaction."

The Court, however, expressing a strong opinion that the plea was bad on this ground, and that the replication was also bad, offered to allow both parties leave to amend without costs, which offer was accepted.

Leave to amend.

—◆—
 REX v. ARMSTRONG, Clerk, on a transcript of outlawry, in a cause of SWANN v. ARMSTRONG, Clerk.

Upon an outlawry on meane process, the sheriff, to a *capias utlagatum*, returned that the defendant was a beneficed clergyman, having no lay fee, but that he was rector of a rectory. The Court, upon motion, ordered a writ of sequestration to be issued to the Bishop.

TOMLINSON moved that a sequestration might be issued to the Bishop of *London*, for the purpose of sequestering the profits of the defendant's living in *Essex*. A *capias utlagatum* had issued to the sheriff of *Essex*, who returned that he was rector of the rectory of—in the diocese of the Bishop of *London*, but that he had no lay property. The outlawry was for a debt of 15,000*l*.

upon mesne process. In support of the application, he relied upon the *King v. Hurd*, Clerk (a), where the defendant was outlawed in the Court of *King's Bench*, and writs of special *capias utlagatum* were issued, directed to the sheriffs of *Shropshire* and *Staffordshire*, who took inquisitions upon them, and the juries found that the defendant was possessed of benefices, but no lay fee; those inquisitions were returned to the Court of *King's Bench*; and the transcript of the outlawry being brought into this Court, and entered as read, the Court ordered a sequestration to issue. In that case, the minute book of the Court of *Exchequer* was referred to, where it appeared that a similar motion was granted in the case of the *King v. Dr. Swinney*, who was stated to be outlawed at the suit of *Godfrey Bosville*, Esq., in a plea of debt for the sum of 1800*l.*, from which he said it was evident that the outlawry was upon meane process, otherwise the writ would have been to satisfy the debt and damages recovered.

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PARKE, B.—I think you may take your rule. All the profits of the benefice will be sequestered, and you can apply to the treasury for your proportion.

The Court awarded the writ.

Rule granted.

(a) 1 Crompt. & Jerv. 389; 1 Tyr. 347, S. C.

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To a declaration in trover, the defendant pleaded the general issue since the new rules came into operation. At the trial the defendant proposed to prove that he was a partner with the plaintiff, and took the goods and sold them to pay a partnership debt: this evidence was rejected, and the plaintiff obtained a verdict. On a motion for a new trial:—*Held*, that the defendant was not precluded by the new rules from disputing the plaintiff's sole right of property, but that the defence ought to have been specially pleaded by way of confession and avoidance.

THIS was an action of trover to recover the value of certain horses and gear, to which the defendant pleaded the general issue. At the trial, the plaintiff proved that he took them to some stables, and that the defendant rode off with them. The defence which the defendant wished to set up was, that he was a partner of the plaintiff, and as such was tenant in common with him of the horses and gear, and that he sold them with the leave of the plaintiff, and applied the produce to the payment of a partnership debt. It was objected, that under the new rules of pleading the defence ought to have been pleaded: on the other hand, it was insisted, that it might be given in evidence under the general issue, because it did not question the property of the goods, but only disproved the conversion. *Gurney, B.*, at the trial, refused to receive the evidence. The plaintiff had a verdict. *Cresswell*, in *Trinity* Term last, having obtained a rule *nisi* for a new trial, on the ground that the evidence was improperly rejected—

Wightman shewed cause.—The evidence was properly rejected. This question turns upon the construction of the rules of pleading of the 3 & 4 *Will.* 4, which regulate the pleadings in actions on the case. Section 1 (a) directs, that “in actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement; and no other defence than such denial shall be admissible under that plea: all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration.” The defence rests on the assumption, that the property was in the defendant, and that he being seised

jointly with the plaintiff, he has as much right to the property as the plaintiff, and therefore the latter could not maintain trover. We contend, that in so doing he disputes our property.

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PARKE, B.—By the plea, the defendant admits the plaintiff's property to be sufficient to maintain the action, and certainly he would have sufficient as against a stranger. On this declaration it was not necessary to shew that the plaintiff was solely seised; it was sufficient that he shewed a right of possession, either alone or jointly. The rule intended that the defendant should not by this plea deny the plaintiff's title. If he had pleaded the joint tenancy, and denied the conversion, he would have shewn that the plaintiff was not entitled to maintain the action. There is no distinction between denying property in part, and property in the whole; both might be pleaded: the new rules say, that under the general issue the conversion only shall be denied and not the title of the plaintiff. A sole owner cannot be guilty of a conversion, and therefore, on a denial of the conversion, he might maintain the issue, by proving property in himself.

ALDERSON, B.—The defendant says, I admit the plaintiff's title to maintain the action, unless he shews a particular sort of conversion.

PARKE, B.—According to the old law, the plaintiff would unquestionably be entitled to recover; but if it appeared that he was only entitled to part, though there was no plea of joint tenancy, he would have been only entitled to recover damages according to his interest.

Wightman.—At all events, the plaintiff would be entitled to half. Suppose the defendant had the whole of the property, it would not alter the case; for in the case of a joint tenancy, there may be such a conversion as

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would enable the plaintiff to maintain the action, although only entitled to part. At the trial, the plaintiff was not prepared with any evidence of his title, and in future no plaintiff would be safe in merely proving a conversion, but he must always come prepared to prove his title.

Cresswell and *Baines* in support of the rule.—We admit that the plaintiff has such a general or special property as would maintain the action, if he could prove a conversion; but the evidence proposed to be given was for the purpose of shewing that what the defendant had done was not in fact a conversion; that there was no such conversion as would, under the circumstances, entitle the plaintiff to sue: such a defence does not depend on setting up a title to the property; the defendant may be considered as having acted as an agent. *Fox v. Hanbury* (a), *Smith v. Stokes* (b), and *Smith v. Oriel* (c), show that a tenant in common of goods cannot maintain trover against his companion, or against any one claiming under the other tenant in common. Here the act was done with the authority of the plaintiff; it could not therefore be a conversion by the defendant. A conversion means a wrongful conversion; and it is necessary for the plaintiff to prove such a conversion as is necessary under the circumstances to maintain the action (d).

The Court took time to consider: and upon a subsequent day in the term, *Parke, B.*, said, that it was a question of considerable importance, and that the argument having turned entirely upon the first section of the rule, the Court wished the question to be re-argued on the second part of the rule, which directed that all matters in

(a) 2 Cowp. 445.

(b) 1 East, 363.

(c) 1 East, 368.

(d) 2 Phillips, Ev. tit. Action of Trover.

confession and avoidance shall be specially pleaded; and the question, therefore, would be, whether the evidence proposed to be given could be pleaded in confession and avoidance.

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In the next term the case was again argued by

Wightman for the plaintiff.—The second part of the rule is in these terms:—"All matters in confession and avoidance shall be pleaded specially, as in actions of *assumpsit*." The wrongful act charged against the defendant in this action is the conversion, but the evidence tendered by the defendant not only put in issue the conversion, but the plaintiff's property also. It therefore plainly infringes on the first rule; and the instance given in the rule, of an action for a nuisance to the plaintiff's house by carrying on an offensive trade, clearly shews, that under the general issue, the evidence adduced was inadmissible; for the pleading of not guilty would merely put in issue, that the defendant carried on the trade in such a way as to be a nuisance to the occupation of the house, but would not operate as a denial of the plaintiff's occupation, and the rule particularly specifies, that in an action for converting the plaintiff's goods, the conversion *only, and not the plaintiff's title* to the goods, can be controverted under the general issue. So here, as the defence set up denied the plaintiff's property in the goods to be such as to enable him, under the circumstances, to maintain trover, it ought to have been specially pleaded, because it disputed the plaintiff's title and property in the goods. Before the new rules, a great difficulty existed in pleading specially in trover. In *Hartford v. Jones* (a), a plea of detainer for salvage was held bad, because it did not confess a conversion. It was also held that a detainer for a lawful purpose did not amount to a conversion; and the only

(a) 2 Salk. 654; 1 Ld. Raym. 393, S. C.

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pleas that have been held to be good, are a release, accord and satisfaction, and a former recovery.

PARKE, B.—That point may be considered as disposed of on the former argument.

ALDERSON, B.—The question is, whether the defence set up could be pleaded specially in confession and avoidance under the new rules.

Wightman.—I apprehend it might be pleaded. If a tenant in common destroys a chattel, he may be guilty of a conversion; if he could not be guilty, it would have been sufficient merely to plead property in himself; but there could be no objection to a plea that the defendant was tenant in common with the plaintiff of the chattels claimed, and that he had not destroyed them. If it be true, as a general rule, that a tenant in common can only be guilty of a conversion by the destruction of the chattel, a plea generally that the defendant was tenant in common with the plaintiff might be sufficient without excepting the destruction: indeed, it was admitted on the last argument, that if the goods were the defendant's own, it would have been sufficient for the defendant to have pleaded that fact, because he could not be guilty of a conversion of his own goods. If, therefore, the general rule is, that a tenant in common cannot be guilty of a conversion, it would lie properly on the other side to shew that the defendant had destroyed the chattel. In trover, the plaintiff undertakes to make out two things:—*first*, property in himself; *secondly*, a conversion by the defendant: if he fails in either, he does not make out his case.

PARKE, B.—At the trial Mr. Baron Gurney refused to admit the evidence, because it was inconsistent with the plea of not guilty; the Court are not prepared to go

along with him to that extent. The question ordered to be argued was, whether, as there was a conversion in fact by the defendant in selling the property and paying debts with the money, he ought not to have pleaded the truth of the case as a defence by way of confession and avoidance. If a conversion only had been denied, the defendant might have proved the facts under the general issue; but the question is, whether the defendant ought not to have admitted the conversion, but pleaded that he had done so by leave of the plaintiff, and that he had applied the money to his own use. The conversion complained of is the taking away, which *prima facie* is a conversion.

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ALDERSON, B.—Should he not have pleaded that he was a partner, and sold and applied the produce of the sale to his own use as partner?

Wightman.—The defendant's case is grounded on his title as partner. Under the new rules, a defendant could avail himself of any defence which admits that the plaintiff had sufficient property in the goods to maintain the action: if the defence intended to be set up is founded on the plaintiff's not having sufficient property to maintain the action, it ought to have been pleaded: the only question is, whether such a plea would have been good. In *Ascue v. Sanderson* (a), which was trover for taking sheep, the defendant pleaded that he was sheriff of *Lincolnshire*, and that *I. S.* recovered against the plaintiff 100*l.*; that a *fi. fa.* was delivered to the defendant to be executed, by virtue of which he seized the sheep and sold them, and concluded thus—"which is the same conversion; without this, that he converted them otherwise, or in any other manner:" and the plea was held bad upon demurrer, principally, as it is said, because the plea did not confess any

(a) Cro. Eliz. 434.

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conversion, and that the defendant ought to have pleaded the general issue and given his defence in evidence under it.

PARKE, B.—There is a case in *Yelverton* (a), which is opposed to that case. I do not say which is correct. Most pleas in trover have been held to be bad as amounting to the general issue, because they denied the property. The whole question turns upon what is the meaning of the term conversion, whether it necessarily means a wrongful conversion. The defence set up admits the plaintiff to have an interest in the goods, and the plaintiff does not aver that he has the entire interest. The defence, therefore, does not absolutely deny that the plaintiff has some property in the goods. The new rules alter the old rules of pleading; but according to the argument, the last part of the rule would be a nullity. Under the old system, the argument would be correct; for the plea would be bad unless it admitted a conversion.

Wightman.—If the defendant could have availed himself of this defence by pleading it, I apprehend that that is conclusive against him.

Cresswell, in support of the rule.—There is nothing in the new rules of pleading to shew that such a plea may now be put upon the record. It is said, that all matters in confession and avoidance must be pleaded; but the rule makes no alteration in the law as to what pleas would or would not be held good on demurrer. There is nothing in the rules to shew whether the term "conversion" was intended to have a different construction to what it formerly had, nor whether the defendant can confess any thing less than a wrongful conversion. Admitting that the rules were framed for the purpose of compelling all matters of defence

(a) *Quare, Kennicott v. Bodan* (cited post), *Yelv.* 198.

to be put upon record, it is still open to me to contend, that in this particular case the rule, in the way it is framed, has not included the present case: I find nothing in the rule to authorize the defendant to deny the conversion.

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ALDERSON, B.—Suppose the case of a watercourse, to which the plaintiff claims a right for his mill, and charges a wrongful diversion of the water by the defendant, and the defendant pleads the general issue, can he at the trial controvert any thing other than the mere fact of the diversion? I believe it has been decided in the *King's Bench*, that he cannot (a).

Cresswell.—I could have shewn it was done by the plaintiff's leave, because it would not then have been a wrongful act by the defendant.

ALDERSON, B.—In trespass, leave and licence must be pleaded; and therefore, there would be an inconsistency.

PARKE, B.—In trespass, the act is not alleged to be wrongful, but only with force and arms; but in case, it is necessary to allege that the act is wrongful.

Cresswell.—The plea proposed on the other side would be bad, because no conversion is confessed. *Agar v. Lisle* (b) was trover for a cow; and the defendant pleaded that the cow was bought with other cattle at a fair, and that he was entitled to toll, and to distrain in case it was not paid him, and that the toll due from the plaintiff for the cow was demanded and refused, and that the defendant, as servant of the Bishop of *Durham*, distrained the cow for the toll, which is the same conversion; and upon

(a) See *Frankum v. Earl of Fal-* M. 330.
mouth, since reported 4 Nev. &

(b) Hobart, 187.

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demurrer, because no conversion was confessed, and because the plea amounted to the general issue, the plea was held bad. In that case, the Court said "the defendant had a lawful cause to take the cow, and also to detain it against demand until the toll was paid, and yet he denies not the plaintiff's property, nor doth any thing against it:" so, in the present case, the plaintiff and defendant being partners, both of them had a right to the property for the purpose of paying the partnership debts. *Salter v. Butler* (a) is a similar case. There, in trover for eight heifers, the defendant pleaded, that he distrained the cattle by command of S., for the arrears of a rent charge, &c., and put the cattle in a pound overt, which is the same conversion; and the plea was held bad on demurrer, because he had not confessed any conversion, as the beasts in the pound were in the custody of the law. It has been said, that no pleas were good in trover but accord and satisfaction, release, and former recovery; but *Allen v. Harris* (b) is an instance of another plea. There, in trover, the defendant confessed the conversion, and pleaded, that the plaintiff had exonerated and acquitted the defendant from all actions and demands in respect of the conversion of the waistcoat in the declaration mentioned, in consideration of the defendant promising to pay the plaintiff twenty shillings. *Dee v. Bacon* (c) also shews, that a conversion must be confessed, to make a plea good. The defendant justifies there for taking goods damage feasant, and concludes with a traverse that he took them otherwise, or in any other manner; and without argument the plea was held bad on demurrer, because it did not confess any conversion and because it amounted to the general issue. The case of *Kennicot v. Bodan* (d) is somewhat at variance: that was

(a) Noy's Rep. 46.

(b) 2 Lutw. 1537.

(c) Cro. Eliz. 435.

(d) Yelv. 198. In *Hartford v.*

Jones, 2 Salk. 654, Holt, C. J. said, that this case in Yelverton was the only instance he knew of a good special plea in trover.

trover for two tuns of wine. The defendant pleaded, that the King was entitled to certain prisages of wine imported in the mode there pointed out, and that the two tuns of wine became due to the King for prisage upon importation of certain wine, and that the defendant being lawfully authorized, &c. took and carried away the two tuns of wine to the use of the King, and converted and disposed of them to the King's use, as he lawfully might, which is the same conversion to the use of the defendant as the plaintiff supposes. Upon demurrer, one of several objections urged to the plea was, that the defendant had not traversed the conversion supposed by the plaintiff, which was a conversion by the defendant himself, but that he justified the conversion to the use of the King, which was a different conversion to that with which the defendant was charged. The Court, however, overruled all the objections; and with respect to the objection to the traverse of the conversion said, that "the defendant need not traverse the conversion, nor plead to it in any other manner than he had done; *first*, because the coming to the hands of the defendant was confessed by the defendant to be to the use of the King, and that is the matter in law on the plea in bar, which the Court is to adjudge, and the matter in law shall never be traversed; *secondly*, if the seizure to the use of the King shall not be adjudged lawful by the defendant, then he himself shall be adjudged guilty of the conversion, because he has acknowledged in point of judgment a possession of the goods and an intermeddling with them." *Bromley v. Coxwell* (a) shews, that the dealing with goods by the plaintiff's leave cannot amount to a conversion. If, therefore, the plaintiff in trover avers a positive tortious act by the defendant, the defendant by the general issue merely denies the wrongful act charged, as by the new rules he is justified in doing, and the evidence ought to have been admitted.

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(a) 2 Bos. & Pull. 438.

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LORD ABINGER, C. B.—The object of the new rules was to enable parties to plead all matters of defence. The rule is general; but if the argument for the defendant is correct, the rule would in fact be confined to the few pleas which were allowed under the old system. The intention of the rules was not to destroy the object and spirit of special pleading, but to extend them. The principal object of special pleading was to bring the question in dispute to a point. It is a matter of considerable importance, and the Court will consider of their judgment.

Cur. adv. vult.

In the course of the term the judgment of the Court was delivered by

PARKE, B., as follows.—To a declaration in trover the defendant pleaded not guilty since the new rules came into operation.

On the trial he proposed to shew that the plaintiff and defendant were in partnership together, and jointly interested in the goods specified in the declaration, and that the defendant took them from the plaintiff's possession, and sold them in order to pay the outstanding partnership debts.

My brother *Gurney* thought the evidence inadmissible under this plea, and rejected it, and the plaintiff had a verdict.

A rule *nisi* for a new trial was granted, and has been since twice argued; once on the question, whether the defendant was precluded by this plea, from disputing the plaintiff's sole right of property in the goods, and afterwards, at the suggestion of the Court, whether the defendant ought not to have confessed the conversion, and pleaded by way of confession and avoidance his right as a partner. Upon the first question, the Court is of

opinion in favour of the defendant; upon the second, against him.

[His Lordship here read the "Rules for Pleading in Case," of *Hilary Term*, 4 *Will. 4* (a), and then proceeded as follows:]

In actions on the case, the plea of not guilty is therefore now equivalent to a plea of not guilty of the conversion; and such a plea undoubtedly admits the plaintiff's property or right of possession. The first question is, what is the extent of that admission.

For the plaintiff, it was upon the several arguments insisted that the sole property or right of possession is thereby admitted to be in the plaintiff: it was also admitted that he was entitled to succeed, if he proved any act done by the defendant which would be a conversion, if the sole property was in the plaintiff.

For the defendant it was insisted, that nothing more was admitted than that the plaintiff had *some* property or right of possession as between him and the defendant, and that the defendant was not precluded on the trial from giving any evidence to disprove a conversion, which was consistent with the admission of such a property. It was therefore contended, that he had a right to prove that the plaintiff had an undivided interest only, and that he himself had a similar interest as partner with the plaintiff; by virtue of which he was authorized to do all that he did, that is, to seize and sell the goods in order to pay the partnership debts: and we are of opinion that the defendant is right in this respect, and that he ought not to have been prevented, on this ground, from giving the proposed evidence.

That an undivided property in a chattel is a sufficient title to maintain trover against a stranger, who has wrongfully dealt with it as his own, or against another tenant in common who has destroyed it, does not admit of a ques-

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(a) Ante, Vol. 2, p. 324, 325.

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tion; but a stranger has always a right to prevent several actions being brought against him by different part owners for the same conversion, and may for that purpose plead in abatement the non-joinder of another part owner as co-plaintiff; and, if he omits to do so, the plaintiff may recover, for any injury to his undivided interest, damages co-extensive with that injury. The authorities on this subject are to be found in the case of *Addison v. Overend* (a).

If, then, the defendant before the new rules, instead of pleading the general issue, had suffered judgment to go by default, he would have admitted no more than that there was some property and right of possession in the plaintiff, in respect of which he was entitled to recover against the defendant, because the plaintiff would not have been bound to prove more than such an interest on the general issue, in order to maintain his action. The same would have been the case upon an assessment of damages on a special plea found against the defendant, or decided to be bad on demurrer, and no greater effect can be attributed to the admission on the record, by pleading to the conversion only. It is but in the nature of a judgment by default as to the remainder; and admits the plaintiff's right to recover something against the defendant, if he can prove what the law would deem a conversion by him of the plaintiff's property in the goods in question.

Such and such only being the effect of this admission, it follows that the defendant may give any evidence in his defence relevant to the issue and *consistent* with that admission, though he cannot be allowed to go into a case which is contradictory to it.

Thus, he could not be permitted to shew that the plaintiff was the finder of the goods, and that himself or some one by whose order he acted, was the real owner, and

(a) 6 T. R. 766.

therefore had a right to dispose of them to his own use: for, that would be inconsistent with the admission which he has made, and a denial that the plaintiff had any property as against himself. Again, he could not give evidence that the sole property was in another by whose directions he did the act complained of, for that also is inconsistent with his admission that the plaintiff had some property; but there is no reason why he should not be allowed to prove that another has the same interest as the plaintiff, and that he lawfully acted by the authority of that other, or to make any other defence to the action which is not inconsistent with the admitted fact, that the plaintiff has some property in the goods as between him and the defendant.

For these reasons, we think that the defendant's admission of the plaintiff's property did not preclude him from the defence which he proposed to make; and the only remaining question is that which was discussed on the second argument—whether it was competent for him to do so under the plea, which is in effect a plea of not guilty of the conversion alleged.

By the new rule, the plea of not guilty in actions on the case operates as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant; and, under the head of examples, is given the action of trover, in which it is said to operate as a denial of the *conversion* only. Does this mean a denial of the fact of the conversion of the property to the defendant's use only, or a denial of the *wrongful* conversion, that is, of the fact of conversion, and also that such conversion was tortious?

A reference to the context enables us to discover the meaning of this term. It is intended to confine the operation of the plea to a denial of the fact of conversion only, and not to allow the defendant to give evidence of its legality, any more than under a plea of not guilty to an action

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on the case for obstructing a right of way, the defendant could be allowed to shew that the obstruction was lawful; or under the like plea to an action for diverting a watercourse, to give in evidence that such diversion was justifiable by licence or prescription. The latter point was decided in *Frankum v. Earl of Falmouth* (a), in the *King's Bench*, in last *Hilary Term*. The effect of the new rules is to alter the previous operation of the plea of not guilty, not merely by preventing it from involving a denial of the inducement as it did before, but also by confining it to a simple denial of the breach, and by excluding all matter in confession and avoidance.

In all cases, therefore, in which there has been a conversion of the property in question by the defendant, and the defendant insists that such conversion was lawful, he ought, since the new rules, to confess and avoid, by pleading specially, the right or title by virtue of which he converted; as, for instance, the leave and licence of the plaintiff, or, as in the present case, the authority given by law to one part owner or tenant in common to take possession of the joint property or sell it.

But a question still remains as to the meaning of the term "conversion:" no doubt occurs in this case, for the seizure of the chattel by the defendant, or its subsequent sale, is undoubtedly a conversion by the defendant; and he must therefore confess and avoid that conversion by pleading specially the title by which he did it.

A question may and no doubt will arise as to the proper course to be pursued where the defendant has a lien on goods, and there has been a refusal to deliver, on demand by the plaintiff; and which demand and refusal, it is well established, is not a conversion of itself, but only evidence of it.

The Court are not under the necessity of pronouncing

(a) 4 Nev. & Mann. 330.

any opinion on this question; but nothing that has been said is to be taken to be an intimation of an opinion, that, in such a case, where there has been a refusal to deliver, on the ground of lien, the right of lien need be specially pleaded.

Rule discharged.

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LAWRENCE v. STEPHENS.

S. B. HARRISON shewed cause against a rule which had been obtained by *John Bayley*, calling on the plaintiff to shew cause why one of two counts should not be struck out of the declaration, and why the plaintiff should not pay the costs. A summons had been taken out for the same purpose, which was attended before *Williams, J.*, who refused to make an order. Particulars had been delivered, from which it appeared that the plaintiff claimed certain tithes from the defendant. The *first* count of the declaration was for the treble value of tithes not set out, and the other count was for tithes bargained and sold.

The plaintiff was in doubt whether the defendant would not set up a composition by way of defence; but it was admitted, that the plaintiff had not a distinct cause of action on both counts: if there was no composition, he was entitled to recover upon the first count; if there was, he could only recover on the second. It was alleged by the defendant, that the intended defence was, that there was a composition, which had been paid.

In an action for tithes, the plaintiff introduced two counts into the declaration: one, for the treble value of tithes not set out, the other, for the same tithes bargained and sold:—*Held*, that this was a violation of the rule of *H. T. 3 & 4 W. 4*, reg. 1, s. 5, and the Court ordered the last count to be struck out, with costs; but bound the defendant to agree not to set up a composition at the trial, or that, if he did, the declaration might be amended.

LORD ABINGER, C. B.—Are not the claims in the two counts substantially different, so that they may exist together?

PARKE, B.—It is not merely one cause of complaint varied in circumstance, but the claims are distinct.

ALDERSON, B.—A count is not to be struck out unless

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in apparent violation of the late rule (a): counts on a bill of exchange, and for the consideration, are for the same subject-matter; and yet both may be inserted.

Bayley, in support of the rule, suggested that that must be considered as an exception: and he referred to a case of *Mackinder v. Mackinder*, at chambers, as precisely in point.

The Court ultimately ordered, that the last count should be struck out, either on the defendant's undertaking not to set up a composition at the trial, or that if he did, that the count might be amended at the trial.

Bayley applied for the costs of the motion, and relied on *Mackinder v. Mackinder*, before Mr. Baron *Alderson*, at chambers, where two counts precisely similar to the present were introduced into a declaration, and the learned Judge ordered one to be struck out, and that the plaintiff should pay costs; and held that it was compulsory upon him to order the plaintiff to pay costs. He also cited *Lacey v. Umbers*, before Mr. Baron *Gurney*, at chambers: the action arose out of a horse-race, and two counts were introduced, one upon the *Newmarket* rules, and the other upon the *Ludlow* rules, there being only one cause of action, and the learned Judge refused to make an order; but upon a subsequent application at *Westminster*, the five Barons of the *Exchequer* being present, an order was made for striking out one of the counts, and the plaintiff was ordered to pay all the costs, as well of the unsuccessful summons as of the amendment.

The Court ordered the plaintiff to pay the costs occasioned by striking out the count.

Rule absolute, with costs.

(a) 4 Will. 4, div. 1, sect. 5. Ante, vol. 2, p. 314.

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ROSS *v.* ROBESON.

CASE for libel.—The defendant pleaded specially, that the supposed libel was published in the *Morning Herald*, and was a true and impartial report of an application against the plaintiff, publicly made in a Court of justice, and that the publication was without any malicious or defamatory intention. The plaintiff demurred, and stated the ground of demurrer in the margin to be, that the matters disclosed in the plea contained no answer to the action. A rule *nisi* was obtained for setting aside the statement in the margin of the demurrer book, on the ground of an alleged noncompliance with the rule (a), which requires that in the margin of every demurrer, before it is signed by counsel, some matter of law intended to be argued shall be stated; and if delivered without, or with a frivolous statement, that it may be set aside as irregular.

A statement in the margin of a demurrer to a plea that the matters disclosed in the plea contain no answer to the declaration:—*Held* insufficient, within the meaning of *R. G. 2, H. T. 4 W. 4.*

F. V. Lee shewed cause, and contended that the rule was sufficiently complied with, as it could not be said that there was no statement, or that the statement was frivolous, and that the statement in the margin correctly specified the principal ground intended to be relied on as an objection to the plea. That ground comprises all the objections; one of which is, that the defendant was not justified in publishing an *ex parte* statement.

Kelly, in support of the rule.—The statement in the margin is too general; the object of the rule was, to compel the defendant to state some specific ground of objection on which he intends to rely, and not some general ground which would be applicable to any general demurrer.

(a) 2 R. G. H. T. 4 Will. 4, (Practice Rules), ante, vol. 2, p. 304.

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PARKE, B.—The statement in the margin is merely a repetition of the general demurrer, and would suit any other general demurrer to a plea quite as well. Some special ground ought to have been stated, and if the point intended to be argued is, that the defendant had no right to publish an *ex parte* statement in a newspaper reflecting on an individual, that should have been stated: one point is sufficient. If the plaintiff will undertake to amend the marginal note, the rule may be discharged on payment of costs.

The rest of the Court concurred.

Rule discharged on those terms.

LINLEY v. POLDEN.

In an action for use and occupation, since the new rules, it cannot be left to the jury to say, whether the evidence produced by the defendant does not amount to an admission, by the plaintiff, that he has been paid, and that nothing is due, without a plea of payment or settlement; and such evidence is inadmissible under a plea of set-off for money due on an account stated between the parties.

ACTION for use and occupation.—Pleas, the general issue, and a set-off for fixtures and chattels bargained and sold, and money due on an account stated. Replication—denial of set-off. At the trial in the Sheriff's Court, it was proved that the defendant had been a lodger of the plaintiff's, at 6s. 6d. per week, for several weeks. The defendant, in answer, alleged that the plaintiff had been paid; and the under-sheriff held that evidence of payment was admissible upon that record. The defendant then produced a book, in the handwriting of the plaintiff, containing several entries of weekly payments by the defendant for the lodgings, and another entry, thus: "Paid all arrears—2l. 17s. 6d. now due," the meaning of which was ambiguous: the defendant contending it was an admission that the accounts between them had been balanced, and that the plaintiff had been paid all that was due; the plaintiff, on the other hand, insisting that it was

an admission by the defendant," that 2*l.* 17*s.* 6*d.* was due at the time that entry was made. The under-sheriff left it to the jury to say, whether they believed that the entries were in the plaintiff's handwriting, and whether from them they believed that the accounts between the parties had been settled, and the balance paid; and, if they did, they might find a verdict for the defendant. The jury found for the defendant.

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Humfrey shewed cause.

Chandless was in support of the rule.

LORD ABINGER, C. B.—I think that the under-sheriff was wrong in his direction to the jury, inasmuch as there was no plea of payment or settlement.

PARKE, B.—There was no plea under which the evidence was properly admissible; for, the plea of set-off of money due on an account stated, had reference to some collateral matter, which would furnish a ground for a separate action by the defendant against the plaintiff, and which the defendant wished to set-off; but no such evidence was given, and therefore, I think there ought to be a new trial.

Rule absolute for a new trial, with leave to amend the pleadings on payment of costs.

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STARLING v. COZENS and Others.

Where several defendants are sued in trespass, and a verdict is found for the plaintiff on some of the issues against some of the defendants, and against him on all the other issues, the plaintiff is entitled to the balance only of the costs, after deduction of all the costs of all the defendants.

Where there are several defendants, and one alone employs an attorney for all, the others are not entitled to claim any costs.

TRESPASS for assault and battery.—The declaration contained two counts: *first* count, for assault, and pushing into the water; *second* count, for taking away the plaintiff's fishing-net. The defendants pleaded jointly the general issue, and at the trial they justified seizing and taking away the nets under the 7 & 8 G. 4, c. 29, s. 35. The jury found a verdict for the plaintiff on the first count against one defendant, *Henry Coxens*, the elder, and for that defendant on the other count, and for the other three defendants on both counts. The Master on taxation having refused to allow the defendants their costs of the issues found for them—

Thesiger obtained a rule, calling on the plaintiff to shew cause why the bill of costs of the plaintiff should not be referred back to the Master to review his taxation, and why he should not tax to the defendant *Henry Coxens* the elder the costs of the issue found for him, and why he should not tax the other defendants for whom a verdict was found their costs, and why they should not deduct such costs from the damages and costs of the plaintiff.

Wordsworth shewed cause, and contended that it did not appear that the three other defendants employed the attorney; that, if he was employed by *Coxens*, the elder, alone, the other three ought not to be allowed any costs: and that the costs ought not to be deducted to the prejudice of the attorney's lien.

Thesiger, in support of the rule.—The plaintiff is a pauper. The cases of *George v. Eston* (a) and *Griffiths v. Kynaston and Others* (b) are expressly in point. In

(a) 1 Bing. N. S. 513.

(b) 2 Tyr. 757.

the former case, a verdict being found against one of three defendants, and in favour of the other two, the Court ordered the costs of those two defendants to be deducted from the plaintiff's costs and damages against the other defendant, without regard to the plaintiff's attorney's lien. In the latter case, three defendants, who were sued in trespass for assault and false imprisonment, appeared by the same attorney, but severed in pleading. The same evidence, with the exception of that of one witness, was adduced for all the defendants; that one witness was called for one of the defendants, who was acquitted, and for whom the Master taxed only 40*s.* costs; and it was held, that he was entitled on taxation to receive from the plaintiff his aliquot proportion of the costs incurred by the three on their joint retainer, as well as the costs he had separately incurred, on satisfying the Master that he was not indemnified by the other defendants.

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PARKE, B.—*Primâ facie*, the attorney was employed by the four jointly. The Master can inquire whether *Cozens* the elder was the person solely employing the attorney. If he alone employed the attorney, the others were at no expense.

ALDERSON, B.—If all the defendants employed the attorney, the costs of all of them are to be taxed, and deducted; but, if *Cozens* the elder alone employed the attorney, then the other three will have no costs to deduct (a). Whatever costs are found for the defendants, or either of them, ought to have been deducted.

Rule absolute.

(a) See *Nanny v. Kenrick*, *v. Thomason*, ante, Vol. 1, p. 572; ante, Vol. 2, p. 334; and *Cox* 2 Crompt. & J. 361.

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COATES and Another v. STEVENS.

Where a defendant pleads payment of money into Court generally upon the whole declaration, and then pleads other pleas to all except as to the money paid in, and the plaintiff takes out the money paid in, and taxes his costs upon rule 19 of *H. T. 4 W. 4*, in full satisfaction, the cause is at an end, and the defendant has no right to the costs of the subsequent pleas, nor can he sign judgment of *non pros.* for want of a replication to them.

Where a defendant has several defences to different parts of the plaintiff's demand, and intends to plead payment into Court as to other parts of the demand, he should first of all plead those pleas, and then the plea of payment of money into Court as to the residue only.

COMYN moved to set aside a *non pros.* signed by the defendant in this action, for irregularity. The declaration was in *assumpsit*, and contained one count for goods sold, work and labour, and on an account stated. The particulars of demand were for 30*l.* 9*s.*, balance of account. The defendant pleaded, first, that the plaintiffs ought not further to maintain their action, because the defendant now brings into Court the sum of 27*l.* 4*s.* 4*d.*, ready to be paid to the plaintiffs, and the defendant further says, that the plaintiffs have not sustained damages to greater amount than the said sum of 27*l.* 4*s.* 4*d.*, in respect of the causes of action in the declaration mentioned, &c. And for a further plea to the said declaration, except as to the said sum of 27*l.* 4*s.* 4*d.*, the defendant says that he did not promise in manner and form as in the declaration mentioned. And for a further plea as to 10*l.*, other parcel of the sums of money in the declaration mentioned, that the defendant paid to the plaintiffs 10*l.* before the action was commenced. And for a further plea, except as to the said 27*l.* 4*s.* 4*d.*, that the plaintiffs were indebted to defendant in 50*l.* The plaintiffs replied:—"That, inasmuch as they could not deny the first plea of the defendant, they would accept, and they did accept, the said sum of money so paid into Court as in the said first plea mentioned, in full satisfaction and discharge of the said causes of action in the said declaration mentioned; therefore, as to the said causes of action, the plaintiffs were satisfied, &c." The plaintiff then took out of Court the money paid in by the defendant, and went before the Master and taxed his costs. Afterwards, the defendant went before one of the Barons at chambers, in order to obtain his costs, on the ground that he had tendered at the time of the service of the writ, 25*l.*,

which application was refused; the defendant then signed judgment of *non pros.* for not replying to the other pleas.

The Court having granted a rule *nisi* for setting aside this judgment—

Addison shewed cause.—The defendant had no other means of getting his costs, than by signing judgment. The 19th rule of *H. T. 4 W. 4*, is this: “The plaintiff, after the delivery of a plea of payment of money into Court, shall be at liberty to reply to the same, by accepting the sum so paid into Court in full satisfaction and discharge of the cause of action in respect of which it has been paid in.” It is contended on the other side, that, as the money was taken out of Court under the rule, the whole declaration was answered, and that the defendant had no right to sign judgment of *non pros.* Here, there was but one count: the particulars of demand and the writ claimed a larger sum than that paid into Court; and as it was decided in *Hodges v. Lord Litchfield* (a), that money cannot be paid into Court on part of a count, the defendant was obliged to pay in the money on the whole count, and was also obliged to plead the other pleas, as the plaintiff went for more than was paid into Court, and the defendant had good answers to the residue of his claim.

PARKE, B.—There was no occasion to have pleaded payment of 10*l.*, because it was not claimed by the plaintiff; he claimed only a balance, after allowing 10*l.* The proper mode of pleading these pleas would have been this:—you should have begun by pleading payment of the 10*l.* before action brought, then the set-off, and then the payment of money into Court as to the residue. All

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(a) Ante, vol. 2, p. 741.

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the defences should be first exhausted, and then the plea of payment into Court should be to the residue only; instead of which, the defendant has paid money into Court on the whole declaration. The rule must therefore be absolute.

Rule absolute.

EVANS v. DAVIES.

A cause was referred at the assizes, and by consent a verdict was entered for the plaintiff, damages 50*l.*, costs 40*s.*, subject to the award of an arbitrator. The time for making the award expired without an award being made; the time was further enlarged by consent, and the enlarged time having also expired without an award being made, the plaintiff gave notice of trial, and proceeded to the trial of the cause, and obtained a verdict. A judge's order having been previously obtained for altering the record in the *distringas*, the clerk of

CHILTON obtained a rule calling upon the plaintiff to shew cause why the verdict found for the plaintiff at the last *Carmarthenshire* Assizes should not be set aside for irregularity. From the affidavits, it appeared that the cause originally came on for trial at the *Spring* Assizes, in 1833, when the cause was referred, and a verdict was entered for the plaintiff, damages 50*l.*, costs 40*s.*, subject to the award of an arbitrator; that no award had been made; that the usual notice of trial was given for the *Spring* Assizes of 1835, and that the defendant's attorney was absent from home till two days before the Assizes commenced, and there was not sufficient time to prepare for trial. The rule was moved for on two grounds:—*first*, that, no proceedings having been taken for four terms, a term's notice of trial was necessary; and, *secondly*, that, as a verdict had already been entered for the plaintiff, that verdict should have been got rid of before the cause could be taken down to a second trial.

E. V. Williams shewed cause.—The first verdict was merely a nominal verdict and was conditional upon the arbi-

trator at the trial erased the indorsement of the previous verdict, and entered the new verdict in the usual way. The Court set aside the latter verdict for irregularity.

A term's notice of proceeding is not necessary after the lapse of four terms if the delay has taken place at the defendant's request.

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trator's making his award; and, by the terms of the reference, the arbitrator was to make his award by the first day of *Trinity* Term, but he had power to enlarge the time, which he did not do; and, therefore, the power of the arbitrator being at an end, the verdict, which was only conditional, became a nullity. From the affidavits it appears that the time for making the award having passed, notice of trial was given for the *Summer Assizes* of 1833, when it was agreed that the time for making the award should be enlarged till *Hilary* Term, 1834; that the plaintiff's attorney applied to the defendant's attorney to name a day for proceeding on the reference, which he neglected to do; that the time for making the award was further enlarged, and that time being expired without any thing being done, that the plaintiff's attorney gave notice of trial for the last *Spring Assizes*; that the defendant's attorney requested him to abandon that notice, which he declined to do, as he had subpcœnaed all his witnesses, and he distinctly informed the defendant's attorney that he should proceed. The defendant's attorney could not be taken by surprise, as it appeared he had subpcœnaed two witnesses from *London*; and at the trial, counsel appeared for the defendant, but said that he appeared only to object to the trial being proceeded with; the Judge, however, determined to try the cause, and it was taken as undefended. It is objected on the other side, that the first verdict ought to have been disposed of before the plaintiff proceeded to trial a second time. The plaintiff certainly might have applied to the Court for leave to enter up judgment on the first verdict, unless the defendant would proceed with the reference. That was an advantage to the plaintiff of which he was not bound to avail himself. At the time the first verdict was entered, all was in *feri*. The record was amended by a Judge's order, by altering the teste of the *distringas*. On the back of the record was indorsed—"verdict for the plaintiff, damages 50*l.*, costs 40*s.*, subject

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to an award." This, which was merely a memorandum of the clerk, was struck out at the time of the second trial: indeed, no final entry could have been made on the *postea* until an award was actually made. There was nothing inconsistent, therefore, on the record at the time of the trial; and the order of *nisi prius* being got rid of by effluxion of time and the neglect of the defendant to proceed, the learned Judge was right in ordering the record to be amended. It is like the case of a verdict being rendered nugatory, where the parties are at liberty to go down again to trial.

Chilton, in support of the rule.—The plaintiff had the means of compelling the defendant to proceed with the reference if he thought proper; he might have made an appointment with the arbitrator, and proceeded *ex parte* if the defendant neglected to attend, or he might have enlarged the time for the arbitrator's making his award. It is sworn that the defendant has been always ready to proceed with the reference, and notice was given to the plaintiff's attorney before he proceeded to trial. The plaintiff might perhaps have applied to the Court to make the verdict (which was conditional) absolute, as was done in *Woolley v. Kelly* (a).

ALDERSON, B., referred to *Hale v. Phillips* (b), where a verdict was taken for the plaintiff for damages subject to the award of an arbitrator; and the arbitrator having omitted to make the award, without any fault on the part of the defendant, the Court refused to allow judgment to be entered for the plaintiff, and held that the cause must go down to trial again.

PARKE, B.—The distinction seems to be where a verdict is given absolutely for the plaintiff, and the amount

(a) 1 B. & C. 68; 2 D. & R. (b) 2 Moo. & Sc. 167; 9 Bing. 89. 158. S. C.

of damages only is referred, as in *Woolley v. Kelly* and *Taylor v. Gregory* (a), and where the verdict itself is referred to an arbitrator, as in *Hall v. Phillips*: in the former case, the death of the arbitrator, or any other intervening accident, does not entirely open the cause; but, in the latter case, it does, and the Court has no power over the defendant.

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Chilton.—At all events, the first verdict ought to have been got rid of: the indorsement on the record was struck out by the clerk of assize at the instance of the plaintiff's attorney, without any authority for so doing. A Judge's order was obtained for amending the record, in these terms:—"Upon hearing the attorney for the plaintiff, I order that the plaintiff be at liberty to amend the *teste* of the *distringas*." That was an *ex parte* order, and was never served upon the defendant, and did not authorize the erasure of the indorsement.

LORD ABINGER, C. B.—I think we must consider the proceeding irregular. The first verdict should have been got rid of before the plaintiff proceeded to trial again.

ALDERSON, B.—It is certainly a verdict as long as it remains on the record; for, by the terms of the reference, the arbitrator has power to alter the verdict and enter a new one, and it is that verdict which gives the Court jurisdiction to compel the parties to do what is right. The rule, therefore, must be absolute.

Chilton applied for costs on the ground that a term's notice ought to have been given, as more than four terms had elapsed since the last proceeding.

(a) 2 B. & Adol. 774.

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Williams, contra.—The plaintiff forbore to give notice of trial at the defendant's request.

PARKE, B.—Then the rule respecting the term's notice does not apply.

Rule absolute without costs.

STARLING v. COZENS.

Where a verdict was found in trespass against one only of several defendants, the evidence applying equally to all, but no leave was given at the trial for leave to enter a verdict against the other defendants:—*Held*, that a verdict could not be entered against them.

TRESPASS against four defendants.—*First* count for assault and battery with special damage.—*Second* count for destroying a fishing net of the plaintiff's. Plea—not guilty. Verdict for the plaintiff for 5*l.* against one of the defendants, and for that defendant upon the second count, and for the other defendants on both counts.

Wordsworth moved for leave to enter a verdict for the plaintiff against the three other defendants on the first count, upon the ground that the same evidence upon which the jury found a verdict against one of the defendants applied equally to all.

LORD ABINGER, C. B.—No leave was reserved to enter a verdict for the other three; and, unless leave was reserved at the trial, we cannot order a verdict to be entered.

PARKE, BOLLAND, and ALDERSON, B*s.*, concurred.

Rule refused.

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KIRBY v. SIMPSON.

BOMPAS, Serjt. moved for a new trial, and that the defendant might be allowed to plead a justification.—It was an action for slander, imputing felony. The general issue only was pleaded, and the plaintiff obtained a verdict for 100*l.*; it was now alleged that it was through the mistake of the special pleader, who supposed that only one plea could be pleaded; and an application to amend was made at *Nisi Prius*, but refused, as being too late. He cited *Hanbury v. Ella* (a), where an amendment was allowed at *Nisi Prius*, by altering an allegation in the declaration, that the defendant had promised to pay for certain goods, into an allegation that he guaranteed the payment of them. This motion was made upon the terms of paying costs, and agreeing to any terms the Court might think proper to impose. It was sworn that there was quite sufficient evidence to support such a justification.

In an action for slander, after a verdict for the plaintiff with 100*l.* damages, the Court refused to allow the defendant to have a new trial and to be allowed to plead the truth of the words upon any terms, though it was alleged that there was ample evidence to support a justification, and the general issue only was pleaded through the mistake of the pleader, which was not discovered till the day before the trial, by the counsel, when an application had been made for leave to add a justification; but the defendant did not swear that he had never used the words, and one of the witnesses had pointed out the want of a special plea a considerable time previously.

Lord ABINGER, C. B.—The motion for an amendment ought to have been made before. If the defendant had sworn he had never used the words at all, I might have been inclined to let the defendant in to plead upon certain terms, but he has not done so; and, after pleading the general issue, and having a verdict against him of 100*l.*, he now wishes to take the chance of a second trial. The application at *Nisi Prius* of being allowed to add a justification of the truth of the words was made on the very day before the cause was expected to be tried. It would be an encouragement to negligence and delay if this motion were allowed. Applications have been frequently made to strike out a justification, but never, that I am aware of, to add one.

(a) 3 Nev. & Mann. 438.

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ALDERSON, B.—One of the witnesses mentioned in *November*, that the defendant could not justify the words, because he had not pleaded that they were true; and no application is made till *February* following, when the cause was in the paper. There is no instance of such an amendment ever having been allowed. In the case cited the amendment was merely formal, and the substantial point in issue was not altered.

BOLLAND, B.—As the mistake was pointed out in *November*, I think it was too late in *February* to apply at *Nisi Prius*.

GURNEY, B., concurred.

Rule refused.

FARRENT v. MORGAN.

In an action to recover a sum of 8*l.* 2*s.* (as claimed by the particulars of demand), the defendant paid 1*l.* 18*s.* into Court under rule 19 of *H. T. 4 Will. 4*, which the plaintiff took out in full satisfaction of the action. The cause of action arose, and both parties lived, within the jurisdiction of the County Court of *Cardiganshire*: and by order of a Judge the defendant was allowed to enter a suggestion on the roll of these facts, and that the action was brought for a sum under 40*s.*, and further proceedings were stayed, with the view of depriving the plaintiff of his costs; but the Court set aside the order, on account of the form of the rule for paying money into Court, the lateness of the application, and its not clearly appearing that the action was brought for less than 40*s.*

R. v. RICHARDS shewed cause against a rule which had been obtained by *Chilton*, for setting aside an order of Mr. Baron *Bolland*, which ordered, that the defendant should be at liberty to enter a suggestion upon the roll that the cause of this action arose within the jurisdiction of the County Court of *Cardiganshire*, and that the plaintiff and defendant resided within the jurisdiction, and that the cause of action was for a sum under 2*l.* and that all further proceedings should be stayed. From the affidavits in support of the rule, it appeared that the action was brought to recover 8*l.* 2*s.*, which were claimed by the particulars of demand for several journeys made by the plain-

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tiff for the defendant, at his request, in an action which he had brought against a person of the name of *Jones*, and also for attending as a witness on the trial of that cause, and for various expenses incurred in respect of those transactions; that the defendant paid 1*l.* 18*s.* into Court under the new rules, which the plaintiff took out in full of all demands in this action; and that under those circumstances the learned Judge had made the above order, with the view to deprive the plaintiff of costs, upon the assumption that the action was brought for a sum under 2*l.* It was now contended, in support of the Judge's order, that the action was substantially brought for only 1*l.* 18*s.*; that, though the particulars claimed 8*l.* 2*s.*, there was no affidavit by the plaintiff that that sum was due, but the affidavit was only made by his attorney; and that, in answer to the rule, it was sworn that it had been agreed that the plaintiff was to have 3*l.* 13*s.* in the whole, as a compensation for the work and labour, &c. for which this action was brought; that the defendant had at different times paid 1*l.* and 15*s.* on account, which being deducted from 3*l.* 13*s.*, left the sum of 1*l.* 18*s.* which was paid into Court; and that, therefore, the action having been brought for only 1*l.* 18*s.*, the Judge was right in making the order to stay any further proceedings, which was in substance an order to prevent the plaintiff from having costs: and he referred to *Stean v. Holmes* (a), where the Court stayed the proceedings in an action which was brought for a sum below 40*s.*, as being beneath the dignity of the Court to entertain it.

Chilton, in support of the rule, contended, that the learned Baron had no power to order a suggestion to be entered, nor to make an order for staying proceedings, though it certainly would have the effect of preventing the

(a) 2 W. Bla. 754.

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plaintiff from getting his costs. The order, he contended, should have been made in direct terms: but, at all events, if the action was really brought for more than 2*l.*, as he contended it was, the plaintiff was entitled to his costs. Here the money was paid into Court by the defendant under the late rule of Court, which was made in consequence of the directions of section 21 of the 3 & 4 *Will. 4*, c. 42, which enacted, that it should be lawful for the defendant in all personal actions, with certain exceptions, to pay into Court a sum of money, by way of compensation or amends, in such manner and under such regulations, as to the payment of costs and form of pleading, as any eight of the Judges might by rule direct. In pursuance of that enactment the Judges made a rule, that the payment of money into Court should be pleaded in a certain form, which was adopted on the present occasion; and by rule 19 of *H. T. 4 Will. 4*, it was ordered, that the plaintiff, after the delivery of a plea of payment of money into Court, should be at liberty to reply to the same by accepting the sum so paid into Court, in full satisfaction and discharge of the cause of action in respect of which it had been paid in, and that he should be at liberty in that case to tax his costs of suit, and, in case of nonpayment thereof within forty-eight hours, to sign judgment for his costs of suit so taxed. The plaintiff, therefore, having thought proper to abandon part of his claim, and take out the sum paid into Court upon the faith of the rule, which gives the plaintiff costs in all cases without any exception, it is too late now to contest his right to costs. The defendant, if he had intended to dispute the plaintiff's right to costs, should have made a special application founded upon affidavits, which the plaintiff would then have had an opportunity of answering. The particulars of demand, it is sworn, were drawn by the attorney who makes the affidavit according to the instructions received from the country; and it is evident that the plaintiff claimed more than 2*l.*; and it is a general rule, in

construing the Court of Request acts, that the defendant cannot claim the benefit of them where money is paid into Court.

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PARKE, B.—I think it cannot be said, that this action was not brought for more than 2*l.*; and the Court cannot deprive the plaintiff of costs, unless it is either admitted upon the pleadings, or clearly shewn to their satisfaction, that the sum to be recovered was under 40*s.*; but upon the other ground this rule must be absolute. Here the money was paid into Court upon a rule which expressly gives the plaintiff his costs on taking it out: the defendant, therefore, must be bound by that rule. If he meant to stay the proceedings on the ground that the sum to be recovered was under 40*s.*, he should have applied at a much earlier period for that purpose; but that application would not have succeeded, because it appears to be perfectly clear that the action was in truth brought for more.

ALDERSON, B.—It may be a question, whether proceedings can be ordered to be stayed, when they are in fact all over.

LORD ABINGER, C. B.—No case has been cited, where a suggestion has been allowed to be entered after the payment of money into Court; but the defendant cannot escape from the terms of the rule under which he paid the money into Court.

Rule absolute.

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GARDNER v. WILLIAMS.

After a verdict for the plaintiff in an action for slander, the defendant obtained a rule *nisi* for arresting the judgment on two grounds, but the Court afterwards discharged the rule without hearing the counsel against it. The defendant then brought a writ of error suggesting the same grounds:—

Held, that these grounds could not be considered as frivolous within the meaning of 9 R. G. H. T. 4 Will. 4.

ADDISON moved for leave to issue execution notwithstanding the allowance of a writ of error, on the ground that the alleged causes of error were frivolous. It was an action for a libel; and, after verdict for the plaintiff, a motion was made in arrest of judgment on two grounds, one of which was, that the *innuendo* (that the libel was of and concerning the plaintiff as a gardener) was too large, and on that ground the Court granted a rule *nisi*, but refused a rule upon the other ground; and, ultimately, when the rule came on, it was discharged, without hearing counsel against the rule. This motion was founded upon the general rule of *H. T. 4 Will. 4, s. 9 (a)*, which provides, “that if the error stated in the notice shall appear to be frivolous, the Court, or a Judge upon summons, may order execution to issue.” The plaintiff in error had suggested the same grounds as had been already overruled.

PARKE, B.—How can we say that an objection is frivolous, upon which the Court granted a rule *nisi*? A party is entitled to a writ of error *ex debito justitiæ*; and, unless the causes of error are clearly frivolous, we cannot interfere. We think it cannot be said that the causes assigned are frivolous within the meaning of that rule.

ALDERSON, B.—The rule may have been discharged without argument because the Court may have considered the case in the mean time.

Rule refused.

(a) Ante, vol. 2, p. 306.

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ROBERTS v. WOOD.

THIS was an action against the defendant as administrator. The defendant pleaded a judgment recovered.—A rule *nisi* was obtained by *John Jervis*, calling on the defendant to shew cause why the plaintiff should not be at liberty to sign judgment as for want of a plea. This rule was moved for on the ground that there was no averment of want of assets *ultra* the judgment, and that the plea did not conclude with a verification by the record; that the declaration was delivered on the 21st *March*; and that on the 25th a letter was received from the defendant admitting assets to the amount of 278*l.*; on the 27th a summons was taken out for time to plead, which was granted on the usual terms; on the 3rd and 8th of *April*, orders for further time were obtained, and on the 9th a peremptory order; and on the 13th the defendant pleaded the above plea of a judgment recovered on the 3rd of *April* for 100*l.*

In an action against an administrator, the defendant, after obtaining time to plead upon the usual terms, pleaded a judgment recovered since the commencement of the action, but did not aver that there were no assets *ultra*. The Court gave leave to the plaintiff to sign judgment as for want of a plea; the defendant having since the commencement of the action admitted by letter the possession of assets sufficient to cover the judgment, and also the plaintiff's demand.

Wightman shewed cause, and contended, that, though the plea was bad in point of form if the plaintiff chose to demur to it, still there was no reason why on that account he should be allowed to come to the Court for leave to sign judgment, especially as it was not suggested that there was any fraud. He applied for leave to amend.

Jervis, contra, contended that this was a case where the defendant was entitled to no indulgence, the defendant having admitted assets beyond what would be necessary to satisfy the judgment recovered as well as the claim in this action, which on account of the smallness of the demand had been ordered to be tried before the sheriff, the plea being clearly bad for want of an averment of no assets *ultra* the judgment.

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The Court were of opinion that the plea was bad in its present shape; and that, under the circumstances, the rule should be made absolute.

Rule absolute.

WHITE v SANDELL.

Where a plaintiff was nonsuited through the neglect of the attorney's clerk to attend in Court, the Court refused to set aside the nonsuit except upon the terms of the plaintiff's attorney paying the costs occasioned by the defendant's attending to try.

ERLE shewed cause against a rule which had been obtained by *Kelly*, for setting aside a nonsuit on payment of the costs of the day. It appeared from the affidavits that this was an action on an indemnity bond, to which *non est factum* was pleaded; but, when the cause was in the paper, being eight off, the plaintiff's clerk left the Court for a few minutes, and in the mean time this cause with others was called on, and the plaintiff nonsuited. It was sworn by the clerk to the plaintiff's attorney, that it was entirely owing to his temporary absence that the cause was called on. There were contradictory affidavits as to the merits of the action; but it appeared, that, on the 6th of *February*, another writ had been issued by the plaintiff on the same bond, and that he had threatened another action, and that the defendant had been informed that the plaintiff had become bankrupt. The defendant with his witnesses had been in attendance several days. It was contended by the defendant that the proceedings were evidently vexatious, and that the Court ought not to give relief.

Lord ABINGER, C. B.—We will only grant this rule upon the understanding that the second action is not to be proceeded with till the further order of the Court, and upon payment by the plaintiff's attorney of the costs of the whole time of the defendant's attending to try.

Rule absolute.

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WELLS v. ODY.

THIS was an action of trespass for injuring a wall. The defence was that it was a party wall, and the defendant justified under the Building Act (14 Geo. 3, c. 78). The plaintiff was nonsuited for declaring in trespass, instead of case. The Master, on taxation, taxed treble costs to the plaintiff under the 100th section.

In an action of trespass for injury to a wall, the defendant justified under the Building Act, and the plaintiff was nonsuited. The Master thereupon taxed to the defendant treble costs under the 100th section of that act. A motion was made to review the Master's taxation on the ground, that the defendant ought to have obtained leave to enter a suggestion under the act, which only gave the defendant costs upon a judgment for costs. The Court discharged the rule.

Bompas, Serjt., having obtained a rule *nisi* to review the Master's taxation, on the ground that no suggestion had been entered on the record to shew that the plaintiff was entitled to treble costs, or to justify the Master in taxing them,

Kelly shewed cause, and contended that it had not been usual, except after verdict, to enter a suggestion. It is not disputed that the defendant is entitled to treble costs, and therefore a suggestion may be entered at any time before the roll is made up; and it is not shewn that judgment is signed. In *Dunbar v. Hitchcock* (a), an amendment was allowed upon the record even after error had been brought, by inserting the certificate of the Judge who tried the cause for allowing the plaintiff treble costs, which had been omitted by the clerk in entering the judgment in the *Common Pleas*. So, in *Bale v. Hodgett* (b), it was held, that, if the jury omit to find costs, the Court may, where the plaintiff is entitled to them, make such entry on the *postea* as is usual, to authorize the Court to allow the payment of costs. The words of the act (c) are, that the defendant shall have judgment to recover treble costs of suit, and shall have such remedy for recovering the same as any

(a) 3 M. & Sel. 591.

(b) 7 Moo. 602; 1 Bing. 182.

(c) 14 Geo. 3, c. 78, s. 100.

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defendant or defendants may have for costs in any other cases by law. If the defendant, therefore, is entitled to treble costs, as it is admitted he is, they will be taxed to the defendant in the same way as single costs, and there will be nothing incongruous on the record. There may be cases where it would be proper to apply to the Court to be allowed treble costs; but, where there is no doubt about the right of the party to the costs, it has not been usual for him to apply to enter a suggestion. The words of the 11 Geo. 2, c. 19, s. 22 are nearly the same as the present, *videlicet*, "that the defendant shall recover double costs of suit on a nonsuit or verdict for him;" and, upon that act, double costs are taxed to the defendant in the usual way without any suggestion: *Johnson v. Lawson* (a), *Staniland v. Ludlam* (b).

Bompas, Serjt., in support of the rule.—There is nothing on the record to shew that any thing more than common costs ought to have been taxed. A suggestion ought to have been entered; and it appears from several cases that the defendant is too late to enter a suggestion after final judgment signed. *Calvert v. Everard* (c), *Watchorn v. Cook* (d), and *Hippisley v. Layng* (e). On the record, the plaintiff appears to have been nonsuited, and therefore nothing but the common costs on a nonsuit ought to have been taxed. The form of the judgment is for so much costs sustained. How can it be said that the plaintiff has sustained treble costs? The judgment ought to have been for treble costs; and in *Collins v. Poney* (f), the Court or-

(a) 9 Moo. 642; 2 Bing. 341.

(b) 7 Dowl. & R. 484; 4 B. & C. 889.

(c) 5 M. & Sel. 510.

(d) 2 M. & Sel. 348.

(e) 4 B. & C. 863; 7 D. & R. 265, S. C.

(f) 9 East, 322. In Tidd's

Prac. 988, 9th ed., it is said, where it does not appear on the face of the record, that the defendant is entitled to the benefit of the act, (as where he pleads the general issue), there is no particular mode appointed for recovery of the costs. The proper mode after a

dered a suggestion to be entered under circumstances precisely similar to the present, and it does not appear to have been there supposed that the defendant could have treble costs without a suggestion. The act is highly penal so far as regards the infliction of treble costs. As there is nothing, therefore, on the record to authorize the taxation of treble costs, without a judgment for that purpose according to the words of the act, the Master's taxation ought to be reviewed.

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LORD ABINGER, C. B.—It does not appear at present that final judgment is signed; and, if it should be entered up for treble costs without a suggestion, the plaintiff will have the benefit of the objection, if it is available. But, as we are bound to allow a suggestion, there is no reason why we should not allow the judgment to be amended if necessary.

PARKE, B.—It appears to me, that, as the defendant is entitled by the act under the circumstances to treble costs, it was the duty of the Master to tax treble costs. At present it is unnecessary to say whether a suggestion ought to be entered or not. If it is, it can only be necessary upon the peculiar language of the 100th section; for, if the words had been, that he shall recover treble costs, no doubt it would have been unnecessary. The cases upon the 11 Geo. 2, c. 19, which have been cited, are express decisions to that effect; even if it were necessary to amend, I have no doubt this Court would give leave to do so. In some cases there must be a suggestion, as in several of the cases which have been cited in support of this motion, where the object was to *deprive* the plaintiff of costs; and there-

nonsuit or verdict for the defendant, is to apply to the Court upon an affidavit of the facts for leave to enter a suggestion on the

roll, which suggestion should be entered before the entry of final judgment.

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fore it would be necessary to shew some reason on the record for taking away the costs, to which he would have been entitled under the statute of *Gloucester*. But here he is as much entitled to treble costs under the act, as he would be to single costs in a common case; and nothing would appear upon the record unless the defendant chose to enter his judgment expressly for treble costs.

BOLLAND, B., concurred.

ALDERSON, B.—The entry of a suggestion would be of no benefit to the plaintiff, and merely increase the expense.

Rule discharged.

11. See Hunter v. Liddell, 20 L. J. Q. B. 100.

RADCLIFFE v. HALL.

An action for a nuisance (to which a plea of the general issue only was pleaded, before the new rules of pleading,) was referred to an arbitrator, who found that the plaintiff had not proved that the defendant was the cause of the injury, and he ordered a nonsuit to be entered, but he also ordered, that the *defen-*

CASE for a nuisance. Plea—the general issue (a). When the cause came on for trial at *York*, it was agreed to be referred. The arbitrator found, that the plaintiff had not proved that the defendant did the wrong; that the setby (which was the nuisance complained of) was an injury to the plaintiff; and he ordered that it should be removed by the defendant in a month, and that the verdict which had been entered for the plaintiff should be set aside, and a nonsuit entered. By the terms of the reference, the costs were to abide the event. The Master taxed the costs, and a rule *nisi* having been obtained by *Wightman* for reviewing the Master's taxation, the ques-

dant should remove the nuisance within a month:—*Held*, that this was a finding substantially in favour of the defendant, and that he was entitled to the expense of all witnesses who could be material under the general issue.

The Master, in taxing the expenses of witnesses, according to a certain scale, cannot allow more than is actually paid for their travelling expenses.

(a) This was before the new rules of pleading.

tion was, what were the proper costs to be allowed. The objection made to the Master's taxation was, that the award being virtually in favour of the plaintiff, the Master had allowed to the defendant the costs of all the witnesses which he had brought forward, and that he ought only to have allowed the defendant the costs of those witnesses who were brought forward solely with the view of disproving the fact that the defendant was the cause of the injury.

Starkie shewed cause.—As there was only one issue, and a nonsuit is entered, the defendant is strictly entitled to costs, as if the plaintiff had been nonsuited in Court; but I only claim to have the costs up to the time of the trial at *York*.

Wightman, in support of the rule.—The parties having agreed to this mode of reference, they must be bound by it. I contend, that all the real merits were found for the plaintiff. It may be difficult to say, what are material and necessary witnesses for the defendant; but, as there were four witnesses, and only four, to prove that the defendant was not the cause of the injury, the other witnesses were wholly unnecessary, and ought not to have been allowed.

PARKE, B.—I was inclined at first to think that the defendant went too far in claiming to have the costs of all the witnesses up to the time of the award, for the arbitrator has found one of the questions against him. I agree with him as to the expenses of the witnesses up to the time of trial; but then a new mode of trial is agreed on, and he is found to be right upon one point, and wrong upon another. It appears to me now, however, that all the witnesses that could be material to the defendant for any defence under the general issue, ought to be con-

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sidered material; for, it was reasonable that he should come prepared on all points that he might think necessary. The Master reports that that was the established practice. I think it can make no difference that it was disposed of by an arbitrator, and not by a jury; and, if by the latter, he would by the old law have been allowed all costs.

Wightman.—There was another point, that the Master has allowed the costs of the witnesses according to a certain scale, which amounts to actually more than in fact was paid.

ALDERSON, B.—The Master's rule is not to allow more than is actually paid, though he may allow according to a scale. One shilling a mile for a witness one way, is what has been allowed. I think more ought not to be allowed than the expenses actually amount to.

PARKE, B.—Let it be referred back to the Master, to reduce the allowance for travelling expenses to the sum actually expended.

Rule absolute on the last point.

YOUNG v. BECK.

Where there are two pleas to the whole action, upon one of which issue is joined to the country, and upon the other judgment is given for the defendant upon

THIS was an action of trespass for arrest and false imprisonment. The defendant pleaded the general issue and also a special plea to the whole cause of action; and, upon a demurrer to the surrejoinder upon the latter plea, the defendant had judgment (a).—*Archbold*, for the defendant, moved for

demurrer, the Court will allow the defendant to strike out the general issue.

(a) See the pleadings, ante, Vol. 2, p. 402.

leave to strike out the general issue, upon payment of the costs of that issue, on the ground that the plaintiff would not be entitled to recover upon that plea, as the special plea went to the whole action.

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The Court, under the circumstances, held that he was entitled to make this application, but that it ought to have been made at chambers.

Rule granted.

HOWELL and Others, Assignees &c., v. BROWN.

SCIRE facias by the plaintiffs (as assignees of a bankrupt) directed to the sheriff of *Carmarthenshire*, upon a judgment recovered by the bankrupt in an action of debt on a *concessit solvere* in the Court of Great Sessions there, before the passing of the 11 G. 4 & 1 W. 4, c. 70, for 855*l*. The declaration referred to the record as being in the Court of *Exchequer*. The defendant pleaded that there was no record of such recovery; upon which the plaintiffs took issue; and now—

Upon a plea of *nul tiel record* to a declaration in *scire facias* in the *Exchequer*, on a judgment obtained in the Court of Great Sessions for *Wales* before the passing of the 11 G. 4 & 1 W. 4, c. 70, the plaintiff is entitled to the judgment of the Court upon producing the certificate, and affidavit of the record being in the hands of the officer, in pursuance of the rules of *M. T. 1 W. 4*, though the actual judgment is not in Court.

Sir *W. W. Follett*, for the plaintiffs, applied for judgment.—The defendant objects that there is no record in this Court to satisfy the averment in the declaration; but there is that which is equivalent to it. By the 14th section of the act of 11 *Geo. 4* & 1 *Will. 4*, c. 70, it is enacted that all the power, authority, and jurisdiction of His Majesty's Judges and Courts of Great Session shall cease and determine at the end of the time limited by the act, and that all suits then depending in any of the said Courts of equity shall be transferred, with all the proceedings thereon, to His Majesty's Court of *Chancery* or Court of *Exchequer*, as the plaintiff, or (in default of his making choice before the last day of next *Michaelmas*

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Term), as the defendant shall think fit, and if in law, to the Court of *Exchequer*, there to be dealt with and decided, according to the practice of those Courts respectively, or of the Court from whence the same shall be transferred, which Court shall, for the purpose of such suits only, be deemed and taken to have all the power and jurisdiction, to all intents and purposes, possessed before the passing of this act by the Court from whence such suit shall be removed. The 27th section directs, that the records of the several Courts, until otherwise provided by law, shall be kept by the same persons and in the same place as before the passing of the act. Upon this act, a rule was made (a), that, in all cases in which a declaration has been delivered or filed in the Court of Sessions, a certificate should be obtained from the prothonotary or late deputy prothonotary of the Court in which the same shall be filed, and be verified by affidavit, to be intitled in this Court, and that such certificate and affidavit shall be filed with the deputy clerk of the pleas; and by another rule (b), it is ordered, that, in case any interlocutory or final judgment shall have been signed in any of the said Courts abolished by the said act, the plaintiff, on filing a certificate thereof as aforesaid, shall be at liberty to proceed thereon in like manner as if such judgment had been signed in this Court; but that, in case process of execution shall issue on any final judgment signed in any Court abolished by the said act, it shall be stated in such process in what Court final judgment was so signed as aforesaid. The plaintiffs have fully complied with those rules; the officer is in possession of the record; and this Court being now invested with all the powers and jurisdiction of the Court below, the possession of the officer is the possession of the Court. The *scire facias* is issued on the supposition that the record is transferred, and, if it is not, there is no other mode of

(a) Reg. 3, M. T. 1 Will. 4, Exch. (b) Reg. 4, M. T. 1 Will. 4, Exch.

proceeding; and therefore the question is, whether the plaintiffs, who have got a judgment of the Court of Great Sessions, have any remedy upon the judgment or not, for the Court below has no jurisdiction. A *scire facias* will not lie on the record of another Court.

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E. V. Williams, contra.—The defendant is entitled to judgment upon this issue, as upon a failure of record. The allegation is, that the judgment of the Great Sessions now remains in the Court of *Exchequer*: it ought to have been, that the record is in the hands of the officer, according to the form and effect of the statute. The act makes a distinction between suits pending and those which are finished: the proceedings in the former are removed, but not the latter; and the reason was, that there was no necessity to remove the proceedings, as the plaintiffs, having got judgment, would be entitled to issue execution at once. If the Court of Great Sessions had continued in existence the plaintiffs could at any time have issued execution upon making an application to the Court upon affidavit. A *certiorari* ought to have been issued to bring up the judgment, but at present the allegation that the judgment is in this Court, is not true.

LORD ABINGER, C. B.—I am of opinion that the plaintiffs are entitled to judgment. The act in effect says, that, when the record is removed into this Court, it is to be dealt with and decided according to the practice of this Court. The plaintiffs have a certificate of the judgment, on which they are proceeding according to the practice of this Court. The suit must be considered as pending until judgment is satisfied.

PARKE, B.—This Court has no jurisdiction except in pending suits (a), and therefore we must construe the act

(a) *Williams v. Williams*, 1 Cr. & J. 387.

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to mean that all unsatisfied judgments are pending suits, and then the fourth rule will apply: and therefore, though the parchment remains in the hands of the officer, he holds it for this Court.

ALDERSON, B.—We have power to adopt the practice of the *Welsh* Courts, or of this Court. If the act was only intended to apply to suits not arrived at judgment, why did the 27th section give the Court of *Common Pleas* power to amend records of fines and recoveries (a)?

Judgment for the plaintiffs, with leave for the defendants to amend the plea (so as to raise the question on the record), on payment of costs.

(a) See *Evans v. Jones*, 2 Moo. & Sc. 383; 9 Bing. 311.

BOND v. BAILEY.

The defendant is entitled to have a suggestion entered under the *London Court of Requests Act*, though the cause was tried before the sheriff by the defendant's consent, and though the motion for that purpose was not made till after the costs had been taxed, final judgment signed and execution

issued: and an affidavit which states that the defendant is a silk broker, and has a warehouse and a counting house in *London*, and that he constantly lived and resided there at the time the cause of action accrued and till the commencement of the suit, sufficiently shews that he sought a livelihood in *London* at the time of the commencement of the action within the meaning of the act.

WHITE shewed cause against a rule which had been obtained by *Platt*, calling upon the plaintiff to shew cause why the defendant should not be at liberty to enter a suggestion under the 39 & 40 *Geo. 3*, c. 104, (the *London Court of Requests Act*), to deprive the plaintiff of costs. He objected that it was not shewn from the affidavits that the defendant sought a livelihood in *London* at the time of bringing the action. The affidavits stated that the defendant was a silk broker, that he had a warehouse and counting-house in *Broad Street, London*, and that at the time of the cause of action accruing, and until the com-

commencement of the suit, he constantly lived and resided in *New Broad Street*, and that the servants of the defendant and his partner constantly resided in *New Broad Street*. He referred to *Miller v. Williams* (a), where it was held, that, if a party's residence is out of the jurisdiction of the Court of Conscience for *London*, his occasionally underwriting a policy at *Lloyd's* coffee-house, where he has a seat, is not seeking his livelihood within the city, so as to subject him to its jurisdiction: and in *Kensett v. West* (b) it was held, that a coal merchant, residing and carrying on business at *Lambeth* in *Surry*, but keeping a counting-house in the city of *London*, for the purpose of receiving orders, is not entitled to the privilege of being sued only in the *London* Court of Requests, as a person seeking his livelihood in the city. He contended, that it must be taken from these affidavits that the defendant's residence was out of *London*, and that the counting-house was merely for the purpose of receiving orders; and that he was therefore not within the meaning of the act; and that it ought to have been more clearly shewn that the defendant lived in *London* at the time of the commencement of the action.

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Upon the affidavits in answer to the rule, which alleged that the trial took place before the sheriff by the defendant's consent, and that the costs had been taxed and final judgment signed, and execution issued, it was further contended, that the act did not apply to a case so tried before the sheriff, and also that the motion was too late.

Platt, in support of the rule, contended, that the defendant ought not to be prejudiced by the fact of his having consented that the trial should take place before the sheriff, because he could not have successfully resisted the application; and that the defendant had brought himself sufficiently within the words of the act.

(a) 5 Esp. 19.

(b) 5 D. & R. 626.

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PARKE, B.—It appears to me that it makes no difference whether the cause was tried before the sheriff or before a Judge; there is nothing in the other objections. The rule must be absolute.

The other Barons concurred.

Rule absolute.

TYNN v. BILLINGSLEY.

In an action for running down a ship, tried at Newcastle-upon-Tyne, the plaintiff having obtained a verdict, the Master refused to allow him the expense of proving certain documents, being the registers and transfers &c. of the ship; upon the ground that reasonable notice had not been given to the defendant, to allow copies to be given in evidence. The commission day was on the 4th March; notice of trial had been given on the 21st February, and the notice to admit the documents was not served till Saturday, the 28th of February, on the London agent. He, however, refused to admit the copies, and another application was made on the following Monday and the copies were produced to him, but he again refused, and a summons was then taken out, returnable the next day, but not attended. On the previous evening the agent sent off the briefs. The Court ordered the Master to review his taxation.

THIS was an action on the case for running down a ship. The defendant pleaded on the 26th of *January* last. Issue was joined on *February* the 4th. Notice of trial was given on the 21st. On *Saturday* the 28th of *February*, the plaintiff's attorney served on the defendant's attorney's agent in *London*, a written notice, calling upon him to admit certain documents necessary to prove the plaintiff's case, viz. a register of the defendant's ship; of the transfer of certain stores therein to the defendant; of the affidavit sworn by the defendant; and of another affidavit indorsed on the registry oath: the originals of which were deposited at *Harwich* Custom-House, and copies only of them were to be had at *London*. The defendant's attorney lived at *Harwich*. This notice was delivered between eleven and twelve on *Saturday*, the 28th, in the form given in the schedule to the rules of *Hilary* Term, 4 *Will.* 4, s. 20 (a), and the inspection offered was to be within 1 o'clock and 6 o'clock on that day at the attorney's office. On the following *Monday* morning an application was made, to know whether it was intended to admit these documents, as no application had been made for an inspection; the answer was, that the admission would not be made. Another application was made the same day, and the documents

were then read; but the defendant's agent still refused; alleging as a reason, that the application was so late that the plaintiff must at all events pay the costs. A summons was then taken out returnable on *Tuesday*, which was not attended, though it was sworn on the part of the defendant, that, if another summons had been taken out, it would have been attended. The commission day was on *Wednesday, March 4th*; though the trial did not take place till the *Saturday* following, at *Newcastle-upon-Tyne*. The plaintiff obtained a verdict. The Master, in taxing costs, disallowed the costs of a witness whom the plaintiff was obliged to bring from *Harwich*, for the purpose of proving the documents in question. A rule *nisi* having been obtained by *Cresswell*, for reviewing the Master's taxation—

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W. H. Watson shewed cause, upon an affidavit, which stated that the defendant's attorney, who resided at *Harwich*, had died a short time previously, and that the agent in town had to prepare the brief, and that he was engaged with another cause at *Hertford*, where the commission day was also on the 4th of *March*: that when the application was made the briefs were nearly prepared, and he was obliged to send them down by the mail on *Monday* night; that the summons was not served till the *Monday* evening; and that then, for the first time, the documents were brought to him to inspect. It was contended, that, upon the construction of the above rule, the notice was not given a reasonable time before the trial, and that the agent ought to have had more opportunity of inspecting the originals or copies, and have had time to communicate with his clients and the clerk of the late attorney in the country; and that the Master was therefore right in not allowing those costs: for, in a subsequent part of the rule, it is directed, that no costs of proving any written or printed documents shall be allowed to any party who shall

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have adduced the same in evidence on any trial, unless he shall have given such notice as aforesaid, and the adverse party shall have refused or neglected to make such admission, or the Judge shall have indorsed upon the summons, that he does not think it reasonable to require it.

Cresswell, in support of the rule.—The rule was intended to save expense, and therefore ought to be construed liberally. It is not pretended that any inconvenience would have accrued from the defendant's making the admissions required; and it is quite clear that the agent in town must have been fully acquainted with the case, and capable of saying whether it was intended to admit these documents or not, as he had the drawing of the briefs and the entire management of the cause. But here the plaintiff having succeeded, he would clearly be entitled to the costs, unless he is deprived of them by the terms of the latter part of sect. 20; and therefore, if the words "such notice as aforesaid," merely refer to the word "reasonable" in the former part of the section, the question is, whether this was not a reasonable notice under the circumstances.

PARKE, B.—I think you were too late to proceed on the 20th section. The latter part of the clause can only be taken in connection with the first part, and means such notice as is there pointed out.

Cresswell then referred to rule 6 of *Hilary* Term, 2 *Will.* 4 (a), and contended, that, these being public

(a) That the expense of a witness called only to prove the copy of any judgment, writ, or other public document, shall not be allowed in costs, unless the party calling him shall, within a reasonable time before the trial, have required the adverse party, by notice in writing and production of such copy, to admit such copy, and unless such adverse party shall have refused or neglected to make such admission. Ante, vol. 1, p. 199.

documents—the copies having been produced to the defendant's attorney—and he having been required to admit such copies, and refused, the plaintiff was, under the circumstances, entitled to the costs of the copies of these instruments.

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The Court (consisting of Lord ABINGER, C. B., PARKE, BOLLAND, and GURNEY, Barons) ordered the rule to be made absolute for reviewing the Master's taxation.

Rule absolute.

SIMON v. LLOYD.

DECLARATION in *assumpsit* for 20*l.*, for goods sold and delivered, 20*l.* for money lent, and 20*l.* on an account stated.

Plea.—As to the sum of 9*l.* 15*s.* 9½*d.*, parcel of the said sums in the said declaration mentioned, the defendant says, that, after the making the said promise in the said declaration mentioned as to that sum, and before the commencement of this suit, to wit, on the 21st day of *October*, 1834, the defendant, at the plaintiff's request, made and drew upon a piece of paper having a bill of exchange stamp duty thereon of the sum of 1*s.* 6*d.*, a certain instrument, purporting to be a bill of exchange, dated the day and year last aforesaid, without a drawer's name thereto, and whereby the defendant was requested to pay to such person, or his order, in *London*, who should place his name thereto as the drawer thereof, 20*l.*, two months after the date thereof, as for value received in goods and cash; and the plaintiff then requested

To *assumpsit* for goods sold, &c. the defendant pleaded as to 9*l.*, part of the debt, that he, at the plaintiff's request, put his name as acceptor to a stamped bill of exchange for 20*l.*, (there being no drawer's name to it), partly for the debt, and partly for his accommodation, and delivered the same to the plaintiff, who accepted it in payment of the debt, and that the bill had not become due at the time the action was commenced. The plaintiff replied, that the bill

then remained in his hands unnegotiated and unpaid, and without any drawer's name put to it:—*Held*, that this replication was no answer to the plea, and that the plea was good. *Quere*, whether it would have been held good if it had been demurred to?

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the defendant to accept the same towards payment and satisfaction of the said sum of 9*l.* 15*s.* 9½*d.*, and for the plaintiff's benefit and accommodation as to the rest of the said sum of 20*l.* to be payable thereby; and the defendant then accordingly accepted the said bill or instrument, and delivered the same to the plaintiff, and thereby became and was liable to pay to the plaintiff, or such person who should place his name thereto as the drawer thereof, or his order, the said sum of 20*l.*, two months after the date thereof, that is to say, towards payment of the said sum of 9*l.* 15*s.* 9½*d.*, and for the plaintiff's benefit and accommodation as to the rest of the said sum of 20*l.*, [and the plaintiff then accepted and received the said bill or instrument in and towards payment and satisfaction of the said sum of 9*l.* 15*s.* 9½*d.*; and] by reason thereof, and according to the law and custom of merchants, he the said defendant then became and was and still is liable to pay to such person who has placed or shall place his name to the said instrument or bill of exchange as the drawer thereof, or his order, the said sum of money in the said instrument or bill of exchange specified, according to the tenor and effect thereof, and of his the said defendant's acceptance thereof. [And the defendant avers that the time for the payment of the money in the said bill or instrument specified had not at the time of the commencement of this suit elapsed, nor had the said bill or instrument then become due or payable (a)]. And this the defendant is ready to verify, &c. And, as to the residue of the said sums in the said declaration mentioned, the defendant says that he did not promise as therein mentioned. And of this the defendant puts himself upon the country, &c.

(a) Those parts of the plea within brackets, were amendments made by the defendant, on payment of costs; the Court expressing an opinion, when the demurrer first came on for argument, that the plea was clearly bad, as it was then pleaded.

Replication.—The plaintiff, as to the plea of the said defendant by him first above pleaded, says that the said instrument in that plea mentioned, from the time of the delivery thereof to the said plaintiff as in that plea mentioned, always hath been, and at the commencement of this suit was, and still is, in the possession of the said plaintiff, unnegotiated, without any drawer's name thereto, and unpaid by the said defendant, or any other person on his behalf; and this he is ready to verify, &c. And, as to the plea of the said defendant whereof he hath put himself upon the country, the said plaintiff doth the like.

General demurrer, and joinder in demurrer.

The point stated in the margin of the demurrer was, "that the fact of the bill taken by the plaintiff on account of the debt being unnegotiated in his possession, is no answer to the defendant's plea.

R. V. Richards in support of the demurrer.—The question is, whether the receipt by the plaintiff of the blank acceptance, does not suspend his remedy for the 9*l.* 15*s.* 9½*d.* until the bill becomes due. *Kearlake v. Morgan* (a) is an authority to shew, that, even if the bill had been given for the exact amount of the debt, the plaintiff's remedy would be suspended as long as the bill was running: for, any person taking the bill would have a good title, and might recover on it against the defendant. The bill being accepted in blank, without a drawer's name, makes no difference; it might have been filled up by the plaintiff at any time, and may be now. But here, the debt was only 9*l.*, and the bill given is for 20*l.*; it therefore amounts to an agreement between the parties, that, in consideration of the defendant's lending his name to the plaintiff for the difference between the amount of the debt and 20*l.*, the

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plaintiff will suspend his right to call on the defendant for the debt, as long as the bill is running.

PARKE, B.—Is there any authority that the defendant would be liable, as acceptor, to the *bearer* of this instrument?

Richards.—I believe not: but, upon the pleadings, this must be taken to be an acceptance, and not a mere promise to accept. The defendant might perhaps be liable upon it as a promissory note. No objection to the form of the plea can be now taken, as the plaintiff has pleaded over; and therefore, as it must be taken upon the plea that it is an acceptance upon which the defendant would certainly be liable to an indorsee for value, the plaintiff's remedy is suspended, and the replication is no answer to it. *Burden v. Halton* (a) is distinguishable from the present case, because there the bills had been returned dishonoured to the plaintiff.

John Jervis, contra.—The plea is bad. It shews no extinguishment of the original debt. The effect of the plea is, that a bill with a blank for the drawer's name was accepted in satisfaction: but a contract not under seal cannot be extinguished by an instrument of a similar nature. A blank acceptance is only a promise to accept.

PARKE, B.—It is a promise which the acceptor cannot avoid performing. Is it not an irrevocable authority, and therefore a good consideration for forbearance? This is not an extinguishment of the debt, but a suspension of the remedy. The acceptance is irrevocable, because the defendant had no means of revoking it.

(a) 4 Bing. 454; S. C. 1 Moo. & Payne, 223.

J. Jervis.—If the bill had been once filled up, it would have been good; but when in blank, it must be looked upon as void, as no remedy is given by it. The statute expressly requires, that the acceptance shall be on the bill, but it was no bill before it was filled up. Neither does the plea show any consideration for the agreement; for it amounts to this, that the creditor agrees to suspend any remedy for three months, if, at the end of that time, the debtor pays him 9*l.* and lends him 11*l.*

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PARKE, B.—That is not the whole of the agreement. The plea shows, that a *negotiable* instrument was given which had not become due. It must be taken upon the pleadings, that it was an absolute acceptance by the defendant, and no option left to him. The plea, therefore, appears to me to be good; and unless the plaintiff amends, judgment must be for the defendant.

The other Barons concurred.

Amendment allowed only on the terms of
payment of costs as between attorney
and client, within a fortnight.

RYVES *v.* BUNNING.

R. v. RICHARDS shewed cause against a rule which had been obtained by *Miller* for staying proceedings in this

A bailable writ
having been is-
sued against a
defendant upon

an affidavit of debt for the amount of several bills of exchange, the defendant's attorney gave an undertaking for the defendant, who was not arrested: an agreement was then made, by which the plaintiff forbade any one to proceed in his name without his authority, and he agreed to give three months notice before he proceeded on the bill transactions between them, and that agreement was to set aside any writ or writs then issued against the defendant. The plaintiff's attorney afterwards gave three months notice that he should proceed, and a new writ was subsequently issued upon a fresh affidavit, upon which the defendant was arrested. Upon a motion to stay proceedings, and that the defendant might be discharged:—*Held*, that the second writ was regularly issued without discontinuing the first action, as nothing had been done upon the first writ, and sixteen months had elapsed since it was issued; but that the agreement meant that the defendant should have three months notice from the plaintiff himself, and that a notice given by the attorney was insufficient; and, on the latter ground, the defendant was discharged out of custody.

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action, and for discharging the defendant out of custody, on the ground that a former action commenced by bailable process, upon the same bills of exchange and promissory notes upon which this action was brought, was still pending; and also that notice of proceeding ought to have been given to the defendant, according to an agreement which had been made between the parties, in these terms:—"That all bill transactions between them heretofore shall stand, as has been mutually agreed between the said *H. W. Ryves* and the said *R. Bunning*, the said *H. W. Ryves* having still power to proceed against the said *R. Bunning*, if he thinks proper so to do. This act and deed to set aside all other acts and deeds that the said *H. W. Ryves* has authorized in this respect as far as relates to any one but himself; and the said *H. W. Ryves* does hereby forbid any one in his name without his further authority to molest or arrest the said *R. Bunning* in his name, or otherwise on his behalf; and the said *H. W. Ryves* does further promise to give the said *R. Bunning* three months notice of proceedings against him on the aforesaid bill transactions, should he think proper so to do; and this agreement to set aside any writ or writs that may be now standing against the said *R. Bunning* in this particular." It was now contended, in answer to the rule, that that agreement, being without consideration, was void; and from the affidavits in answer to the rule, it appeared that notice had been given by the plaintiff's attorney that the plaintiff would proceed in the action, and that he had waited several months after that before he commenced the present action to which the agreement did not apply; and that though a bailable writ was issued in the second action, there had been no arrest on the first writ, but the defendant's attorney gave an undertaking, and it was issued sixteen months ago.

Miller, in support of the rule, contended that the second action being commenced by bailable process before the

first action (which was also commenced by bailable process) was discontinued, was irregular; and he relied upon *Bishop v. Powell* (a); and, secondly, that by the terms of the agreement three months notice should have been given by the plaintiff of his intention to commence the present action.

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PARKE, B.—The first writ being sixteen months old, and not executed, goes for nothing. By the terms of the agreement the plaintiff ought personally to have given three months notice; and the notice given by the attorney was insufficient; and, upon this ground, I think that the rule ought to be made absolute.

LORD ABINGER, C. B.—I am of the same opinion.

Rule absolute.

(a) 6 T. R. 616.

— *See final r. Fairbank. 22. 11. 22. 201.*

EVANS v. LEWIS.

LUDLOW, Serjt., moved to set aside the verdict for the defendant in an action of trover. The count was in the usual form. The defendant paid money into Court, under sect. 21 of the 3 & 4 Will. 4, c. 42. viz. 30*l.* for the value, and 1*l.* 10*s.* for the costs, which the plaintiff took out of Court; and the question was, whether the sum paid into Court was sufficient to cover all the damages sustained. It appeared that the defendant, who was a carrier, had delivered the goods two days after they ought to have been delivered. The plaintiff proved, that he was in want

In trover for goods, the defendant pleaded payment of money into Court, and the plaintiff replied that he had sustained more damages: the defendant paid into Court the cost price of the goods, having offered the goods in specie to the plaintiff two days only after they ought to

have been delivered. The plaintiff proved that he had sustained inconvenience and loss by not having the goods delivered at a proper time. The jury, however, found for the defendant, and the Court refused to set aside the verdict.

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of the goods, and should have made 30 *per cent.* by selling the goods by retail, and that, in consequence of the delay, he had declined receiving them. It was contended, that the plaintiff was entitled to some damages, beyond the price of the goods, for the detention of the goods for two days, and therefore that the verdict should have been for nominal damages, as the subsequent delivery did not prove the original wrongful detention; and *Buller's Nisi Prius* (a) was cited, where it is said, "If a man take my horse and ride him, and after deliver him to me, yet I may have trover against him, for the riding was a conversion, and the redelivery will only go in mitigation of damages."

LORD ABINGER, C. B.—There is no ground for this motion. The case cited is correct, but the jury are not bound by the cost price. I believe it has been held that special damage is not recoverable in trover; here no special damage was laid: I do not know that it can be recovered. The act of Parliament says, that money may be paid in by way of compensation or amends; here the money was so paid in, and the jury thought that it was sufficient.

ALDERSON, B.—The small delay in delivering the goods would not necessarily make any variation in the value. The jury thought that the plaintiff was wrong in not accepting the goods, and the costs therefore ought to fall upon him.

Rule refused.

(a) *Buller's Ni. Pri.* p. 46, citing 1 *Danv.* 21, *Countess of Rutland's case.*

END OF EASTER TERM.

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ADMINISTRATOR.

In an action against an administrator, the defendant, after obtaining time to plead upon the usual terms, pleaded a judgment recovered since the commencement of the action, but did not aver that there were no assets *ultra*. The Court gave leave to the plaintiff to sign judgment as for want

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of a plea; the defendant having since the commencement of the action admitted by letter the possession of assets sufficient to cover the judgment, and also the plaintiff's demand. *Roberts v. Wood*, 799

AFFIDAVIT.

See ILLITERATE DEPONENT.

1. Where long affidavits are filed in support of a motion, a great part of which is unnecessary, the Court will refer them to the Master, and make the party applying pay the costs of the unnecessary affidavits. *Lewis v. Woolrych*, 692

2. An affidavit, in which the word "oath" was omitted, was held insufficient. *Oliver v. Price*, 261

3. "*Phillips*, assignee &c.," is an irregular mode of describing a plaintiff in intituling an affidavit. *Phillips v. Hutchinson*, 20

4. The alteration of a figure in the date of an affidavit in the *jurat*, by writing one figure over another, does not constitute an erasure or interlineation within the meaning of the rule. *Jacob v. Hungate*, 456

5. An affidavit with the word "said" instead of "saith" is insufficient. *Honworth v. Hubbersty*, 455

H H H

D. P. C.

6. "Assessor" is not a good description of a deponent in an affidavit. *Nathan v. Cohen*, 370

7. If an affidavit be joint, an objection to the description of one of the deponents does not render the statements of the others inadmissible. *Ib.*

8. If an affidavit purports to be signed by a deponent, it will be no objection that it is signed in a foreign character, and there is no statement in the jurat to shew that the deponent is a foreigner, and that the writing in question is his signature. *Ib.*

AFFIDAVIT (ENTITLING).

See AFFIDAVIT, 3.

1. An affidavit intituled *G. Shrimpton v. Wm. Carter* the elder, sued as *Wm. Carter*, the cause being *G. Shrimpton v. Wm. Carter*, was rejected as being badly intituled. *Shrimpton v. Carter*, 648

2. An affidavit of debt sworn before a commissioner need not be intituled in any Court. *Urquhart v. Dick*, 17

3. An affidavit in support of a motion for entering up judgment on a warrant of attorney (given when no suit is pending) need not be intituled in any cause. *Davis v. Stanbury*, 440

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5. The Court declined to act upon an affidavit which was intituled *A. v. B.*, executor &c., without specifying the party of whom the defendant was executor. *Clark v. Martin*, 222

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AFFIDAVIT (OF DEBT).

AFFIDAVIT (USING).

Affidavits sworn in opposition to one rule, on which the allegations in them may be immaterial, cannot be used without re-swearing, in opposition to another rule, on which they may become material, although the same question might be intended to be raised on the first rule, which was actually raised on the second. *Quelly v. Boucher*, 107

AFFIDAVIT (OF DEBT).

See BAIL-BOND, 1.

1. If the affidavit of debt on a bill of exchange does not state the amount, the bail-bond will be set aside with costs. *Molineux v. Dorman*, 662

2. An affidavit of debt, that the defendant is indebted upon and by virtue of a mortgage deed in the sum of 500*l.*, by which the defendant covenanted to pay that sum at a certain day now past, is sufficient, without averring that the money was not paid at the appointed day. *Masters v. Billing*, 751

3. The date of bills of exchange need not be stated in an affidavit to hold to bail, if it appear in the affidavit that the day of payment of the bills is passed. *Shirley v. Jacobs*, 101

4. An affidavit of debt, for goods sold and delivered to, and for money paid and laid out for, *S.*, the wife of the defendant, before his intermarriage with her:—*Held*, insufficient. *Gray v. Shepherd*, 442

5. An affidavit of debt made by a person who described himself as agent and collector to the plaintiff, an hotel-keeper:—*Held*, sufficient. *Short v. Campbell*, 487

6. An affidavit sworn before the deputy signer of the bills of *Middlesex*, before the Uniformity of Process Act came into operation, was held sufficient to warrant an arrest upon a *capias* issued after the passing of that act. *Beck v. Young*, 280

7. *Semble*, that if in an affidavit of debt for principal and interest, a sum and date are mentioned, from which interest can be computed, it is not essential that the amount of interest claimed should be specifically mentioned. *Rogers v. Godbold*, 106

8. An affidavit of debt on a covenant in a deed for payment of a certain sum at a particular day, which is sworn to have passed, and that the defendant is indebted in the amount, is sufficiently positive, though it is not in terms alleged that the money was not paid at the day appointed. *Lambert v. Wray*, 169

9. An affidavit of debt on a bill of exchange, which states that the defendant is indebted on a bill, which was payable at a day past, is sufficient, without stating that the bill was not paid when due, or that it is still unpaid. *Phillips v. Turner*, 163

10. An affidavit of debt for 500*l.* for money lent, and interest thereon, and on an account stated, without noticing a contract for interest:—*Held*, sufficient. *Pickman v. Collis*, 429

11. An affidavit of debt claiming interest is sufficient, though it neither states the amount of the principal, nor the time when it began to run. *White v. Sowerby*, 584

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2. A mistake in a *ca. sa.* in stating the amount recovered, may be amended on payment of costs. *Arnell v. Weatherby*, 464

3. The Court refused to allow the christian name of a plaintiff to be amended after issue joined. *Moody v. Aslatt*, 486

4. Where a party is allowed to amend on condition of paying costs, but he amends and proceeds without such payment, he is still not liable to an attachment. *Turner v. Gill*, 30

5. A plaintiff a few days previously to the assizes obtained a judge's order, giving him liberty to amend, and the defendant was to have two days' time to plead anew. The plaintiff afterwards delivered the issue, and took no further notice of the order, either by amending or rescinding it; and though the defendant returned the issue as irregular, the plaintiff proceeded to trial, and got a verdict. The Court refused to set aside the verdict as irregular. *Black v. Sangster*, 206

6. Where the form of certificate to
H H H 2

be made by commissioners for taking the acknowledgments of married women to deeds prescribed by the 84th section of the 3 & 4 Will. 4, c. 74, does not suit the peculiar circumstances of the case, the Court of *Common Pleas* will make a special order for the alteration of the form in that case. *In re Sarah Luke*, 112

ANNUITY DEED.

See DECLARATION, 3.

ANSWERING MATTERS OF AFFIDAVIT.

See ATTORNEY, 14.

APPEAL (ADJOURNMENT OF).

The 9 Geo. 1, c. 7, s. 8, only applies to the first sessions after executing the order of removal, and therefore the Court will not interfere with the discretion of the magistrates at the second, as to adjournment, if it is in furtherance of a reasonable practice. *Rex v. the Justices of Monmouthshire*, 306

APPEAL (NOTICE OF).

If a regular notice of appeal has been given for one sessions, and the appeal be adjourned at the instance of the appellants, after hearing counsel on both sides, it is not necessary to give a strictly regular notice of trial for the following sessions. *Rex v. the Justices of Gloucestershire*, 298

APPEARANCE.

See BAIL-BOND, 2—DECLARATION, 1
—JUDGMENT.

ARBITRATION.

See AWARD—COSTS, 1.

1. The refusal of an arbitrator to examine witnesses is sufficient misconduct on his part to induce the Court to set aside his award, though he may think that he has sufficient evidence without them.

The authority of an arbitrator cannot be revoked after he has made his award. *Phipps v. Ingram*, 669

ARBITRATION.

2. If parties agree to refer, there being an action pending, without a Judge's order, the reference is within the 9 & 10 Will. 3, c. 15; and an application to set aside the award must be made before the end of the term next after its publication. *Rushworth v. Barron*, 317

3. Where, from the misconduct of one of the parties to an award, the submission cannot be made a rule of Court, so as to enable the opposite party to make it a rule of Court before the last day but one of the first term after the award, the time for a motion to set it aside will be enlarged until the following term. *Re-Arbitration of Perring and Keymer*, 98

4. Where the time for making an award is enlarged by the arbitrator, without strictly complying with the directions of the order of reference, but the time is subsequently again regularly enlarged, with the consent of the parties, no objection can be made to the award on account of the first irregular enlargement of the time. *Benwell v. Hinxman*, 500

5. The decision of an arbitrator (though not a barrister) is final, though it can be clearly shewn that his award is founded on a misapprehension of law. *Ashton v. Poynter*, 201

6. Where a mixed case of law and fact is referred to a non-legal arbitrator, and he decides absolutely upon them without raising any question upon his award, his decision is final, and the Court will not entertain a motion for reviewing such decision, either as to the facts or the law. *Jupp v. Grayson*, 199

7. An arbitrator, to whom all matters in difference are referred, has no right to state facts for the opinion of the Court, unless there is a special direction given to him to do so; in such a case, the opinion formed by the arbitrator is absolutely final. *Barrett v. Wilson*, 220

ARREST.

ARREST.

See AFFIDAVIT OF DEBT, 6—MIS-
NOMER, 1, 2.

1. A defendant who has been wrongfully arrested upon a *Sunday*, upon a charge of forgery, without any warrant, may be lawfully arrested upon civil process, as he is leaving the police office after he has been ordered by the magistrate to be discharged. *Jacobs v. Jacobs*, 675

2. *Seemle*, that, in order to constitute an arrest, the warrant must be produced; but the closest watching of the defendant is not sufficient. *Robins v. Hender*, 543

ARREST (OF JUDGMENT).

See DECLARATION, 3—JUDGMENT—
MISNOMER, 1.

The record in an action for slander stated that the writ issued on the 4th of *June*, and that the words were spoken on the 27th:—*Held*, that this discrepancy on the record was no ground for arresting the judgment. *Steward v. Layton*, 430

ARREST (SECOND).

See BAIL-BOND, 3.

A defendant having been arrested for a debt, and having put in special bail, settled the action by giving a bill of exchange for 30*l.*, drawn by a third person and accepted by himself, and the plaintiff then discontinued the action. The bill being dishonoured, the plaintiff again arrested the defendant on the bill:—*Held*, that the second arrest was regular. *Hamber v. Cooper*, 671

ARREST (WITHOUT PROBABLE CAUSE).

See AWARD, 4.

1. A defendant was arrested upon a writ, in which the sum of 37*l.* was by mistake inserted as the sum for

ARREST.

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which bail was to be taken; but upon the back of the writ the plaintiff demanded 27*l.* only, which was the amount really claimed. The officer was informed of the mistake, and desired to arrest for the smaller sum. The defendant was arrested and sent to prison; and the plaintiff, at the trial, made out a claim to the extent of 28*l.*: but there being no count in the declaration to warrant part of the demand, he agreed to forego that part to prevent further litigation, and take a verdict for 20*l.* only. The Court, under these circumstances, refused to allow the defendant his costs under the 43 *Geo. 3*, c. 46, s. 8. *Preedy v. Macfarlane*, 458

2. The defendant was arrested for 20*l.* and the plaintiff recovered only 8*l.*, but it appeared that the price of the goods for which the action was brought had been agreed upon in writing, which the plaintiff, by accident, was unable to prove at the trial, and there was contradictory evidence as to the value of the goods:—*Held*, that the defendant was not entitled to costs under the 43 *Geo. 3*, c. 46. *Shatwell v. Barlow*, 709

3. Two defendants having been arrested for a sum of 45*l.*, the plaintiff at the trial recovered only 21*l.* Part of the demand was for a sum of 19*l.* 10*s.*, which it was stated by a witness he had seen paid on a particular day, and a receipt was put in, from which it appeared that the money was paid on a former day. The jury, under the circumstances, disallowed that part of the plaintiff's demand, and also made a small deduction from the other part. It was not denied, however, by the defendants that the money was due, and it was positively sworn by the plaintiff that it was due from the defendants:—*Held*, that the defendant was not entitled to his costs under the 43 *Geo. 3*, c. 46. *Smith v. Smith*, 733

ARTICLES OF CLERKSHIP.

See ATTORNEY, 7—SERVICE UNDER ARTICLES OF CLERKSHIP.

If the original indenture of clerkship is lost, a copy may be enrolled.
Ex parte Chapman, 562

ASSAULT.

See JUSTIFICATION.

ASSETS.

See ADMINISTRATOR.

ATTACHMENT (AGAINST THE SHERIFF).

See SHERIFF.

Where the writ was returnable on the 22nd, and the plaintiff did not declare *de bene esse* till the 30th, the Court on setting aside an attachment against the sheriff on payment of costs, refused to order the attachment to stand as a security, it not appearing that the plaintiff had lost a trial. It lies on the plaintiff in such a case to shew that he has lost a trial. The affidavit of the officer need not deny collusion with the bail, nor need the bail deny collusion with the officer. *The King v. the Sheriff of Middlesex, in a Cause of Finlay v. Rallett,* 194

ATTACHMENT.

See AMENDMENT, 4—ATTORNEY, 3, 10—ATTORNEY AND CLIENT, 4—AWARD, 1, 2, 5—RETURN OF WRIT, 1, 2—SERVICE OF WRIT, 1—SHERIFF, 1, 6, 7, 8—SMALL DEBTOR, 2—SUBPENA.

1. A rule for an attachment against an executor for not accounting pursuant to a rule of Court was made absolute, though that rule had not been personally served, upon an affidavit that the defendant kept out of the way to avoid being served, and that a copy had been left at the house with the daughter of the defendant. *In re Edward Barwick,* 703

2. A party cannot have a rule absolute, in the first instance, for an attachment for not paying costs, pursuant to a rule of Court, where those costs form part of a rule, for disobedience to which a rule *nisi* only for an attachment can be granted. *Ex parte Townley,* 39

3. An application to set aside an attachment may be made by one of the bail on his own affidavit denying collusion, without an affidavit from the other bail.

Where there has been a default, an attachment against the sheriff may be obtained, though the defendant is surrendered before the attachment is moved for. *The King v. The Sheriff of Middlesex in a Case of Ridgway v. Porter,* 186

4. A personal service of the rule of Court must be made to ground an attachment for nonpayment of money pursuant to a Judge's order, which is afterwards made a rule of Court; and service of the order and *allocatur* are not sufficient, nor is service of the rule on the London agents of the attorney sufficient: and for this defect an attachment, issued at the end of *January*, and executed on the 12th of *February*, was set aside in *Trinity* term following. *Woollison v. Hodgson,* 178

5. An attorney's bill having been ordered to be taxed after the client had given a bill of exchange for the amount, it was found he had been overpaid, and he was ordered to refund the overpayment to the client, and also by a subsequent order to pay the costs of taxation, more than a sixth having been taken off. Upon the application of the attorney to be allowed to pay these sums to the holder of the bill of exchange (which had been dishonoured) instead of his client, he was ordered to do so within a week, or, in default, that an attachment should issue:—*Held*, that no demand of these two sums was neces-

sary to ground an attachment, but that it was his duty to seek the holder of the bill, and pay the money to him. *Woollison v. Hodgson*, 178

6. Where the party against whom a rule *nisi* for an attachment was obtained, appeared, and objected that the rule *nisi* had not been *personally* served, the Court, notwithstanding, made the rule absolute. *Levy v. Duncombe*, 447

7. In order to obtain an attachment for nonpayment of costs pursuant to the Master's *allocatur*, it must appear, by the affidavit, that the persons denying the payment are those mentioned in the *allocatur*. *France and Others v. Wright*, 325

8. Where a rule of Court directs costs to be paid to the party or his attorney, a demand not made by the attorney who had conducted the cause in London, but by the attorney in the country who employed him, is sufficient. *Dennett v. Pass*, 632

9. An attachment for nonpayment of costs may be obtained on the 22nd April, although the affidavit does not shew that any demand was made since the 2nd of February. *Rez v. Rogers*, 605

10. Where it is clear that the copy of the rule and *allocatur* have come to the hands of the defendant, an attorney, the Court will grant a rule *nisi* for an attachment, although strict personal service has not been effected. *Phillips v. Hutchinson*, 583

11. A Judge's order directed, that, on payment or tender of the debt and costs to the plaintiffs, their attorney or agent, the plaintiffs should deliver up to the defendant certain deeds held by the plaintiffs as a security. An attachment was moved for on an affidavit that the money was tendered to the plaintiffs' attorney's agent, and the deeds demanded, but that they had not been delivered:—*Held*, that the affidavit was insufficient, and that no-

tice should have been given to the plaintiffs, and a demand made personally of them. *Evans and Wife v. Millard*, 661

12. A rule for an attachment for nonpayment of costs, pursuant to the Master's *allocatur*, between attorney and client, is *nisi* in the first instance. *Green v. Light*, 578

13. In order to obtain an attachment for nonpayment of costs, pursuant to the Master's *allocatur*, a demand is not necessary, if the party sought to be served by his violence prevents the demand from being made. *Wenham v. Downes*, 573

14. In order to obtain an attachment, it is not sufficient that all the necessary steps are taken, partly at one time and partly at another. *Rogers v. Twisdel*, 572

15. In order to obtain an attachment for nonpayment of costs, pursuant to the Master's *allocatur*, it is not indispensably necessary that a copy of the rule and *allocatur* should be left on the person of the defendant. *Rez v. Koops*, 566

16. Personal service of the rule for payment of costs is necessary in order to obtain an attachment although the defendant is an attorney. *Albin v. Toomer*, 563

17. An attachment cannot be obtained for nonpayment of costs, pursuant to the Master's *allocatur*, if there was no undertaking, in the Judge's order for taxation, to pay what should be found due. *Harrison v. Ward*, 541

ATTESTING WITNESS.

See LANDLORD AND TENANT.

ATTORNEY.

See ARTICLES OF CLERKSHIP (ENROLLING)—ATTACHMENT, 16—ATTORNEY'S CERTIFICATE—BAIL, 3, 15—CONSOLIDATING ACTIONS—ERROR,

2—HABEAS CORPUS—MASTER'S DISCRETION, 1—NEGLECT—NEW TRIAL, 1, 2—RESIDENCE OF ATTORNEY—RESIDENCE OF DEFENDANT, 1—SERVICE UNDER ARTICLES OF CLERKSHIP—SET-OFF—STAYING PROCEEDINGS, 6—SUNDAY—UNQUALIFIED PRACTITIONER—VENUE, 1.

1. An attorney, not having had his name enrolled in the alphabetical book kept at the Prothonotary's Office, pursuant to 37 Geo. 3, c. 90, s. 27, will not be allowed to enter it *nunc pro tunc* after an action for penalties has been commenced. *Ex parte Swift, in the case of Matthew v. Swift,* 636

2. It is no ground of demurrer to a declaration in an action by an attorney that he seeks to recover for "materials" supplied by him to his client. *Fisher v. Snow,* 27

3. Where an attorney is in contempt by disobeying a rule of Court, the proper course of proceeding against him is by moving for an attachment, and not by applying to strike him off the roll. *Ex parte Townley,* 39

4. It is no ground for disallowing to the plaintiff's attorney his costs of conducting the action, that he was not on the roll of attorneys of this Court, if it appears that he conducted the proceedings in the name of a London attorney, who was an attorney of the Court. *Goodner v. Cover,* 424

5. An attorney cannot be re-admitted without deposing to his having given notice to the Stamp Office of his intention to apply for readmission. *Ex parte Bridgman,* 371

6. Where an attorney brings several *qui tam* actions, and, after their commencement, makes an offer to the defendant to compromise them, it is no ground for striking him off the roll. *Smith v. Gillett,* 364

7. Where a clerk has been articted to a second master pursuant to the 23 Geo. 2, c. 46, s. 9, and the affida-

vit of such articles has not been filed within three months after their execution, in accordance with section 3 of that statute, he cannot be admitted, nor can such affidavit be filed *nunc pro tunc*. *Ex parte Joy,* 342

8. If an attorney practises after the expiration of his certificate, even though with the hope of taking one out, he cannot be re-admitted without payment of the arrears of duty for the years during which he has practised, and something more than a nominal fine. *Ex parte Philpot,* 339

9. Where an attorney, through the negligence of his clerk, has omitted to make the entry pursuant to the 37 Geo. 3, c. 90, s. 27, in due time, the Court will allow that entry to be made *nunc pro tunc*, if he has taken out his certificate regularly, and paid the duty for that year. *Ex parte Fry,* 838

10. Where an attorney disobeys a rule of Court, requiring him to do a particular act, an application cannot in the first instance be made to strike him off the roll; but a rule *nisi* for an attachment may be obtained.

If by the same rule he is required to pay certain costs, and a clause is also introduced into it authorizing the issue of an attachment in case of non-payment, that may at once issue although a rule *nisi* only will be granted for disobedience to the other part of the rule.

A bankrupt's certificate does not remove an attorney's liability to an attachment for not duly investing his client's money. *Ex parte Grant,* 320

11. Directing an attorney to employ a proctor to obtain probate of a will is not such an employment of him in the character of an attorney as will give the Court summary jurisdiction over him, as to money received by him to pay the proctor. *Ex parte Cowie,* 600

12. On an application against an

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attorney for an attachment for his contempt of a Judge's order, made a rule of Court; the Court will take judicial notice of his being on the roll. *Ex parte Carolina Hore*, 600

13. If the agent of an attorney neglect to take out his certificate, and the latter continues in ignorance of the neglect to practise, he may be re-admitted on payment of a nominal fine, and the arrears of duty. *Ex parte Thorpe*, 592

14. A motion to compel an attorney to answer the matters in an affidavit cannot be made on the last day of term. *Re Turner*, 557

ATTORNEY (ADMISSION OF).

See ATTORNEY 5.

ATTORNEY (CHANGING).

If the attorney on the record is changed, without an order for that purpose, but the opposite party treats the new attorney as the attorney in the cause, he cannot afterwards object that no order was obtained. *Farley v. Hebbes*, 538

ATTORNEY (RE-ADMISSION OF).

See ATTORNEY 5, 8, 13.

An attorney, who through inadvertence has practised without his certificate, cannot be re-admitted without an affidavit, shewing that a notice has been given to the *Stamp Office* of his intention to apply for re-admission. *Ex parte Franks*, 319

ATTORNEY-GENERAL.

See COMPOUNDING PENAL ACTION—
DEMURRER, 5.

ATTORNEY'S BILL.

See PLEA, 10—TAXATION.

1. A summons to tax an attorney's bill, though it was served, was held not to operate as a stay of proceedings from its return, so as to prevent

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the attorney issuing a writ, the defendant not having signed a consent in the book to pay the amount of the taxation. *Williams v. Roberts*, 512

2. After the lapse of nine years, the Court will not compel an attorney to re-deliver bills for business done by him, without some suggestion of fraud. *Manning v. Brown*, 31

3. In an application to tax an attorney's bill, the Court will take judicial notice of his being on the roll. *Ex parte King*, 41

4. In such an application, however, it must be sworn that there are taxable items in the bill, although the bill itself is exhibited. *Ib.*

ATTORNEY'S CERTIFICATE.

See ATTORNEY AND CLIENT, 5.

If an attorney neglects to take out his certificate between the 15th *November* and the 16th of *December*, but before the expiration of the year he takes it out, he is entitled to recover his costs for business done during the uncertificated interval, if his neglect has not been wilful. *Bowler v. Brown*, 80

ATTORNEY AND AGENT.

See ATTACHMENT, 4, 8, 11—ATTORNEY, 4, 13—MERITS, 3.

ATTORNEY AND CLIENT.

See ATTACHMENT, 5, 11, 12—ATTORNEY, 2—ATTORNEY (CHANGING)—
STAYING PROCEEDINGS, 6—SUNDAY
—TAXATION—UNQUALIFIED PRACTITIONER.

1. A bailable writ having been issued against a defendant upon an affidavit of debt for the amount of several bills of exchange, the defendant's attorney gave an undertaking for the defendant, who was not arrested: an agreement was then made, by which the plaintiff forbade any one to proceed in his name without his authority, and he agreed to give three months' notice before he proceeded on the bill transactions between them, and that agreement was to set aside

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any writ or writs then issued against the defendant. The plaintiff's *attorney* afterwards gave three months' notice that he should proceed, and a new writ was subsequently issued upon a fresh affidavit, upon which the defendant was arrested. Upon a motion to stay proceedings, and that the defendant might be discharged:—*Held*, that the second writ was regularly issued without discontinuing the first action, as nothing had been done upon the first writ, and sixteen months had elapsed since it was issued; but that the agreement meant that the defendant should have three months' notice from the *plaintiff* himself, and that a notice given by the *attorney* was insufficient; and, on the latter ground, the defendant was discharged out of custody. *Ryces v. Bunning*, 817

2. An attorney is not justified in proceeding with an action after it has been settled between the parties themselves, though it is known that costs have been incurred, and that the plaintiff himself is not in a condition to pay them; it must be shewn affirmatively, that the settlement was come to for the purpose of cheating the attorney. *Jordan v. Hunt*, 666

3. Rule 23 of 1 *Reg. Gen.*, H. T. 2 *Will.* 4, gives the attorney a lien on a judgment obtained by him for his costs as *between attorney and client*. *Watson v. Mascal*, 638

4. An attorney who gives a false residence of his client, without using proper means to ascertain whether it is correct or not, subjects himself to the costs which may be occasioned by moving for an attachment against him; but he is not liable to pay the costs of the action, if he is *bond fide* unable, after proper inquiry, to give his client's residence. *Neal v. Holden*, 493

5. *Seem*, that if an attorney has been admitted and does not take out his certificate for a year, he need not be re-admitted previous to taking it

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out; but whether he need or not, if he has taken out his certificate under such circumstances, the client's interest will not be affected. *Hillary v. Hungate, Bart.*, 56

AUCTIONEER.

See INTERPLEADER, 14—PLEA, 2.

AWARD.

See ARBITRATION — LANCASTER (COURT OF C. P. OF), 2—VERDICT, 2.

1. Personal service must be effected before an attachment can be obtained for non-performance of an award on which an action will lie. *Richmond v. Parkinson*, 703

2. If a party proceeds to enforce an award by attachment and afterwards by action, the attachment may be set aside, but only on the terms of the defendant's giving a bail-bond. *Earl of Lonsdale v. Whinnay*, 263

3. A rule for setting aside an award must appear, on the face of it, to be drawn up on reading the award itself or a copy of it; and the Court will not allow it to be amended.

Where a rule for setting aside an award was drawn up on imperfect materials, and was therefore discharged; the Court, under special circumstances, allowed a new rule.

In the *King's Bench*, the Court may look at the record on discussing a motion for a new trial, although the rule is not drawn up on reading it; therefore, the Court may look at the record on an application to set aside an award made pursuant to an order of *Nisi Prius*, although the rule is not drawn up on reading it.

If it clearly appear, from reading an award, that the arbitrator intended to leave a particular question of law open, the Court will consider it, although in terms the arbitrator may in one part of his award have determined it. *Sherry v. Oke*, 349

4. If an arbitrator, to whom a cause

is referred by order of *Nisi Prius*, takes no notice in his award of a power given him by the order to give the defendant his costs, on the ground of an excessive arrest, but does dispose of the general costs of the cause, the Court will not interfere to give the defendant his costs. *Greenwood v. Johnson*, 606

5. Where an award found that a balance of 17*l.* was due from the plaintiffs to the defendant, but contained no order on the former to pay the money, the Court refused to grant an attachment for nonperformance of the award. *Scott v. Williams*, 508

BAIL.

See ATTACHMENT AGAINST THE SHERIFF — ATTACHMENT, 3 — BAIL-BOND, 4 — PROCEDENDO — POWER OF PRINCIPAL — UNIFORMITY OF PROCESS ACT, 2—SCIRE FACIAS, 3.

1. A notice to justify at eleven, all parties appearing at ten:—*Held*, sufficient.

A notice of justification, which omitted to state where the bail resided for the last six months, and also whether they were householders or freeholders:—*Held*, not to be cured by the affidavit of justification according to the old rules, though it contained those requisites: and time to amend was refused, the bail having been put in too late; and also the costs of opposition. *Beal's Bail*, 708

2. An affidavit of justification, which stated that the property of the bail consisted of household furniture and effects, was held not to be sufficient without stating where the property was. *Cooper's Bail*, 692

3. Where bail was put in in this form—"Ety, by Cole," the former not being an attorney of this Court, though the latter was, the proceedings were held to be informal, but time was given to amend. *Marden's Bail*, 654

4. An affidavit of justification of bail, which merely states the bail "possessed" instead of "worth," will not be allowed to be amended. *Naylor's Bail*, 452

5. The want of entry in the book of the notice of exception is waived by giving notice of justification.

A notice of justification, which stated that the bail had resided for the last six months at the parish of *W.* without stating the street, &c., held bad.

Costs of opposition on technical grounds are not allowed. *Hanwell's Bail*, 425

6. An affidavit of justification of bail stated that the bail was a house-keeper at *S.*, but did not state that he resided there:—*Held*, that this was a sufficient deviation from the form given by the rule of *T. T. 1 Will. 4.*, to deprive the defendant of the costs of justification. *Heald's Bail*, 423

7. A two day's notice of justification by a prisoner, accompanied by an affidavit according to the rule of *Trinity* term, 1 *Will. 4.*, is bad, unless it expresses that he is a prisoner. *Bullen's Bail*, 422

8. Keeping a brothel is not of itself a ground for rejecting bail. *Gouge's Bail*, 320

9. "He's" is sufficient in an affidavit of justification instead of "he is."

The name of a township, without the name of a street, stated to be in a certain parish named in the notice of bail, is sufficient.

It is sufficient for a bail to swear to property over and above "what will pay his just debts."

"Debts," without describing them as "book debts," is sufficient.

"Yeoman" is a good description of a bail. *Lanyon's Bail*, 85

10. If one of the bail below consents to time being given to the defendant to perfect bail above, his act is binding upon both. *Howard v. Bradberry*, 92

11. Although bail are unopposed, the Court will not allow them to justify if it has been satisfied in a previous case that they are unfit. *Laporte's Bail*, 110

12. Upon the justification of bail in a country cause, one of the bail was allowed time to explain respecting some property which it was alleged was mortgaged: this being afterwards done—*Held*, that the defendant was entitled to the costs of justification. *Grant's Bail*, 165

13. If bail are opposed on the ground of the affidavit of justification being defective in not swearing that they are "worth" the requisite amount; but it appears that the bail are, in fact, sufficient, and afterwards justify, the defendant will not receive the costs of justifying bail, but he will not pay the costs of opposing. *Popjoy's Bail*, 170

14. Bail coming up a second time to justify must pay or deposit the costs of a former unsuccessful attempt; and where costs are payable, the defendant's being in prison will not excuse him from payment. *Pasmore's Bail*, 214

15. Where bail made a motion in the name of an attorney, who denied having given any authority to allow his name to be used, the Court discharged the rule; but refused to make an order for costs against the person making the affidavit, on the ground that he was not before the Court. To obtain such costs, a special application must be made against him. *Norton v. Curtis*, 245

16. The 4th rule of *Trinity* term, 1 *Will.* 4, which directs, that, if a plaintiff does not give one day's notice of exception, where the bail justify by affidavit under the new rules, the recognizance may be taken out of Court, does not apply where the bail are put in in that mode after the regular time for putting in bail has ex-

pired, for then the bail must actually justify as formerly, before a motion can be made to set aside proceedings upon the ground that bail have been put in and justified. *The King v. Wilson*, 255

BAIL (ADDING).

See *MERITS*, 4.

BAIL (RELIEF OF).

See *BAIL*, 10—*BAIL-BOND*, 6.

1. Where a defendant has been committed to *Newgate* by commissioners of bankrupt, the *Common Pleas* cannot bring him up that he may be rendered in discharge of his bail, but they will enlarge the time for his render, although not "till he has passed his last examination." *Waugh v. Ashford*, 123

2. Where bail would be fixed by an indulgence granted by the Court, such terms will be imposed upon the plaintiff as will give the bail an opportunity of freeing himself from his liability. *Bradley v. Bailey*, 111

BAIL-BOND.

See *CAPIAS*, 8.

1. After a rule *nisi* had been obtained for cancelling a bail-bond for a defect in the affidavit to hold to bail, the plaintiff offered to consent to a Judge's order to the same effect, the costs to be costs in the cause and no action to be brought:—*Held*, that, notwithstanding this offer, the defendant was entitled to have his rule made absolute with costs. *Clarke v. Crockford*, 693

2. Where a bail-bond is cancelled, the plaintiff is not bound to accept an appearance by the defendant, though the entry of it was mentioned as a condition in the rule *nisi*. *Perring v. Turner*, 15

3. A defendant having been arrested, the plaintiff, on the ground of

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some irregularity, discontinued the action, and paid the costs. He again arrested the defendant by leave of a Judge, and the sheriff, not having had notice of the discontinuance of the first action, detained the defendant for some time on both writs; but it appeared that the defendant had in fact suffered no inconvenience, as, before he tendered bail on the second writ, the sheriff had notice served on him of the discontinuance of the first action. The Court, under these circumstances, refused to interfere, or to order the bail-bond to be cancelled, on the ground that the first action was not completely discontinued. *Price v. Day*, 463

4. A plaintiff can in no case have the bail-bond to stand as a security, (though it may clearly appear that, in point of fact, he has been prevented from going to trial by bail above not being perfected in due time), unless he has declared *de bene esse* against the original defendant; neither can the Court impose terms on the defendant where the application is by bail to stay proceedings on payment of costs, bail above being perfected. *Call v. Thelwell*, 445

5. A bail-bond was given to the sheriff on the 24th of November, and it recited that the defendant had been arrested on the 17th: bail above not having been put in within due time after the 17th, the plaintiff took an assignment of the bail-bond. Upon motion to set aside the assignment as having been made too early, upon an affidavit that the recital in the bond was false—that, in fact, no arrest was made, but only a letter sent, and that therefore the writ could not be said to be executed till the 24th, when the bond was given, the Court refused to interfere. *Call v. Thelwell*, 443

6. The rule of *M.*, 59 *G.* 3, *K. B.* is now adopted into the practice of the Court of *Exchequer*; and, there-

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fore, bail or sheriffs, applying for relief, must comply with the terms of that rule. An affidavit by bail, applying to stay proceedings on payment of costs, which stated that the application was made for their *own* indemnity, instead of *only* indemnity, was held insufficient. *Call v. Thelwell*, 444

7. It is not necessary that the assignment of a bail-bond by the sheriff under the 4th *Anne*, c. 16, s. 20, should be attested by the two witnesses, in whose presence it must be made at the time of the assignment. *Philips v. Barlow*, 381

BANKRUPT.

See BAIL (RELIEF OF), 1.

In answer to an action by a landlord against the assignees of a bankrupt for rent, the latter may plead that the term did not vest in them; and to avoid the effect of 1 & 2 *Will.* 4, c. 56, s. 25, also, that it did vest, but that they abandoned it, and were not therefore liable. *Thompson v. Bradbury*, 147

BARRISTER.

See ARBITRATION, 5.

BEDCHAMBER (LORD OF).

See PRIVILEGE FROM ARREST, 3.

BILL OF EXCHANGE.

See PLEA, 2, 11, 14, 16, 21, 22—
REPLICATION, 3, 4, 5, 6—STAYING
PROCEEDINGS, 2—VENUE, 10.

BISHOP.

See SEQUESTRATION, 1.

BOND.

See PLEA, 1.

BREACH OF CONTRACT.

See INTEREST.

CAPIAS.

See AFFIDAVIT OF DEBT, 6—INDORSEMENT ON PROCESS—SHERIFF'S RETURN.

1. If the defendant's residence is sufficiently described in a *capias*, with the exception of the county, that defect is supplied by the direction to the sheriff. *Perring v. Turner*, 15

2. A *capias*, which was in this form, "if *se* shall be found in your bailiwick," instead of "if *she* shall," &c., was held not to be so defective as to warrant the Court in discharging the defendant from custody. *Sutton v. Burgess*, 489

3. An indorsement on the copy of a *capias* served on a defendant at the time of the arrest, which required the defendant to pay the debt within four days from the arrest or service thereof:—*Held*, sufficient. *Ib.*

4. If the warning in a *capias* is placed at the foot of the writ, it is only necessary in the body to introduce the words "hereunder written," and not "indorsed hereon" besides. *Bridgman v. Curgenvon*, 1

5. The omission of immaterial particles in the writ of *capias* is not an irregularity of which the Court will take notice, if the omissions do not alter the meaning of the writ. *Forbes v. Mason*, 104

6. *Quære*, whether it is necessary to state in a *capias* the county in which a defendant is supposed to reside? *Border v. Levi*, 150

7. A writ of *capias* directed to the "sheriffs" of *Middlesex* is irregular. *Jackson v. Jackson*, 182

8. A defendant being arrested on a writ, which stated the action to be trespass on the case upon promises, an application was made by the defendant to a Judge to be discharged, on the ground that the form of action was misdescribed, but it was refused. He then gave a bail-bond, and special

bail not having been put in in due time, the plaintiff took an assignment of the bail-bond and proceeded upon it. The bail, having taken out summonses to stay proceedings without success, applied to the Court to set aside the *capias* against the original defendant: the Court refused to interfere. *Gurney v. Hopkinson*, 189

9. A writ of *capias* to answer the plaintiff in an action of *trespass on the case* upon promises is merely irregular and not void, and a defendant, to avail himself of the objection, must apply in proper time. *Ib.*

10. The Court will not amend a writ of *capias* in the direction.

Semble, that *Middlesex*, (put by mistake for *Middlesex* in a writ of *capias*,) does not vitiate the writ, so as to entitle the defendant to set it aside, and to a discharge from custody. *Colston v. Berens*, 253

CENTRAL CRIMINAL COURT.

The Court of *King's Bench* will, under special circumstances, remove an indictment for a misdemeanour from the *Central Criminal Court*. *Rex v. Caldecott*, 315

CERTIORARI.

See CENTRAL CRIMINAL COURT—INFERIOR JURISDICTION, 1, 2.

1. If a plaintiff without improper motives has removed a judgment into a superior Court by an irregular writ of *certiorari*, issued without leave of the Court, such amendments will be allowed, and terms imposed, as will enable him to avail himself of the judgment, without prejudice to the defendant. *Rowell v. Brendon*, 324

2. The Court will not quash a writ of *certiorari*, unless there is an admission, or something tantamount to it, by the party suing it out, that he has done so for the purpose of delay. *Landens v. Sheil*, 90

CHAMBERS (APPLICATION AT).

See INTERPLEADER, 7.

CHAPLAIN (KING'S).

See PRIVILEGE FROM ARREST, 2.

CHARGING IN EXECUTION.

See FOREIGN JUDGMENT.

Where a defendant has been taken in execution on a *ca. sa.*, and he afterwards removes himself into the custody of the marshal, the plaintiff is neither obliged to carry in the roll, nor to charge him in execution. *Deemer v. Brooker*, 576

CHECK.

See PLEA, 3.

CHURCHWARDEN.

See MANDAMUS, 2.

CLERGYMAN.

See OUTLAWRY, 8.

COGNOVIT.

See PRISONER, 1.

1. The Court refused to grant a rule for setting aside a *cognovit* at the instance of the defendant, because it was not stamped. *Clarke v. Jones*, 277

2. No notice to tax is necessary when a defendant appears in person and gives a *cognovit*, which is good, though there is no declaration. *Ib.*

3. Under a *cognovit*, by which it is agreed, that no judgment is to be signed, or execution issued, unless default made in payment of a certain sum, with costs, by instalments, the plaintiff may sign judgment and issue execution for the whole sum, if default is made in one instalment. *Rose v. Tomblinson*, 49

4. A *cognovit* containing terms of agreement must be stamped; but it is sufficient, to support an execution

under it, if it is stamped by the time cause is shewn against a rule for setting aside the execution, on the ground of its not having been stamped. *Rose v. Tomblinson*, 49

COLLUSION.

See ATTACHMENT AGAINST THE SHERIFF—ATTACHMENT, 3.

COMMISSION TO EXAMINE WITNESSES.

See FOREIGN WITNESS, 2.

COMMISSIONER.

See AFFIDAVIT (ENTITLING), 2.

COMPOSITION.

See AMENDMENT, 1—PLEA, 20.

COMPOUNDING PENAL ACTION.

Leave of the Court for compounding a penal action, where the Crown is entitled to a portion of the penalty, cannot be obtained without the consent of the Attorney-General. *Re v. Gibbs*, 345

CONCLUSION.

See PLEA, 19.

CONDITION.

See AMENDMENT, 4.

CONDITION (BREACH OF).

See MERITS, 4.

CONDUCT MONEY.

See SUBPENA, 4—WITNESS.

CONFESSION AND AVOIDANCE.

See PLEA, 24.

CONSIDERATION.

See PLEA, 3, 4, 11, 16, 20, 21, 22—
REFLEADER—REPLICATION, 4, 5.

CONSOLIDATING ACTIONS.

Where six actions of trover had been brought against the same defendant by different plaintiffs employing the same attorney, the Court refused to order the proceedings in five of them to be stayed to abide the result of one, it being sworn that the causes of action were different in all of them. *Nicholls v. Lefevre*, 135

CONTEMPT.

See ATTORNEY, 3, 12.

CONTEMPT OF PROCESS.

Mere violent snatching an original writ of summons from the person serving a copy of it is not a contempt of the process of the Court. *Weekes v. Whitely*, 536

CONTINGENCY.

See INSOLVENT, 2.

COSTS.

See ARREST (WITHOUT PROBABLE CAUSE), 1, 2, 3—ATTACHMENT, 2—ATTORNEY'S CERTIFICATE—ATTORNEY AND CLIENT, 3, 4—AWARD, 4—BAIL, 1, 5, 6, 12, 13, 14, 15—BAIL-BOND, 1—COUNTY COURT, 1, 2—COURT OF REQUESTS, 1, 2—DEMURRER-BOOKS, 1, 2—EXECUTOR, 1, 2, 3, 4, 5—INQUIRY (WRIT OF)—JUDGES' CERTIFICATE—MASTER'S DISCRETION, 1—MERITS, 5—NEGLIGENCE—PAYMENT INTO COURT, 1—POLICE OFFICER—SECURITY FOR COSTS—SET-OFF—SITTINGS, 1—SLANDER—STAYING PROCEEDINGS, 1, 2—TAXATION—UNNECESSARY PROCEEDINGS.

1. An action for a nuisance (to which a plea of the general issue only was pleaded, before the new rules of pleading,) was referred to an arbitrator, who found that the plaintiff had not proved that the defendant

was the cause of the injury, and he ordered a nonsuit to be entered, but he also ordered that the *defendant* should remove the nuisance within a month:—*Held*, that this was a finding substantially in favour of the defendant, and that he was entitled to the expense of all witnesses who could be material under the general issue. *Radcliffe v. Hall*, 802

2. The Master, in taxing the expenses of witnesses, according to a certain scale, cannot allow more than is actually paid for their travelling expenses. *Ib.*

3. In an action of trespass for injury to a wall, the defendant justified under the Building Act, and the plaintiff was nonsuited. The Master thereupon taxed to the defendant treble costs under the 100th section of that act. A motion was made to review the Master's taxation on the ground that the defendant ought to have obtained leave to enter a suggestion under the act, which only gave the defendant costs upon a judgment for costs. The Court discharged the rule. *Wells v. Ody*, 799

4. A clause in a local act, which appointed commissioners for certain purposes, prohibited them under a penalty from acting or voting where they were personally interested. One of the commissioners being sued for the penalty, the plaintiff was nonsuited:—*Held*, that the action could not be said to be brought for "an act or thing done under the act," so as to entitle the defendant to treble costs under another clause of the act. *Charlesworth v. Rudgard*, 517

COSTS (IN THE CAUSE).

Where a rule *nisi* is obtained to reduce the plaintiff's damages, or set the verdict aside, the plaintiff is not entitled to the costs of opposing the rule as costs in the cause, although he succeeds upon one of the alterna-

COSTS (IN THE CAUSE).

tives offered by the rule, unless he gives notice to the opposite party of his intention to abandon the other.
M^r Andrew v. Adams, 120

COSTS (OF FORMER TRIAL).

If a Judge, of his own authority, discharges a jury from giving a verdict, on the ground of their not being able to agree, the party ultimately successful will not be entitled to the costs of the first attempt at trial.
Seely v. Powers, 372

COSTS (OF THE DAY).

1. The motion for costs for not proceeding to trial is for a rule to be absolute in four days, unless cause is shewn in the meantime. *Robinson v. Robinson*, 177

2. Where a cause, standing in the paper is postponed at the instance of the plaintiff, on payment of costs by him, the defendant is entitled to no more costs than he would have been entitled to, if the record had been withdrawn. *Walker v. Lane*, 504

COUNSEL.

See JURYMAN—WRIT OF TRIAL, 4.

COUNSEL'S SIGNATURE.

See PLEA, 17—SERJEANT.

Where the Vice-Chancellor directed the opinion of the Court to be taken on a special case, the Court would not permit it to be entered for argument with the signature of a Master in Chancery, who had settled it, instead of the signature of counsel; but this Court will not compel an attorney to lay the case before counsel for the purpose of signature. *Roy v. Champneys*, 105

COUNTY COURT.

See SHERIFF, 9.

1. In an action to recover a sum of 8*l.* 2*s.* (as claimed by the particulars of demand), the defendant paid

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1*l.* 18*s.* into Court under rule 19 of *H. T. 4 Will. 4*, which the plaintiff took out in full satisfaction of the action. The cause of action arose, and both parties lived, within the jurisdiction of the County Court of *Cardiganshire*: and by order of a Judge the defendant was allowed to enter a suggestion on the roll of these facts, and that the action was brought for a sum under 40*s.*, and further proceedings were stayed, with the view of depriving the plaintiff of his costs; but the Court set aside the order, on account of the form of the rule for paying money into Court, the lateness of the application, and its not clearly appearing that the action was brought for less than 40*s.* *Farrent v. Morgan*, 792

2. The fact of the plaintiff's cause of action not exceeding 40*s.* and the defendant being resident within the county of *Middlesex*, and liable to be summoned to the County Court, cannot be pleaded. *Sandall v. Bennett*, 294

COURT OF REQUESTS.

1. The defendant is entitled to have a suggestion entered under the *London Court of Requests Act*, though the cause was tried before the sheriff by the defendant's consent, and though the motion for that purpose was not made till after the costs had been taxed, final judgment signed and execution issued: and an affidavit which states that the defendant is a silk broker, and has a warehouse and a counting-house in *London*, and that he constantly lived and resided there at the time the cause of action accrued, and till the commencement of the suit, sufficiently shews that he sought a livelihood in *London* at the time of the commencement of the action within the meaning of the act. *Bond v. Bailey*, 808

2. An action for the use and occu-

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fore it would be necessary to shew some reason on the record for taking away the costs, to which he would have been entitled under the statute of *Gloucester*. But here he is as much entitled to treble costs under the act, as he would be to single costs in a common case; and nothing would appear upon the record unless the defendant chose to enter his judgment expressly for treble costs.

BOLLAND, B., concurred.

ALDERSON, B.—The entry of a suggestion would be of no benefit to the plaintiff, and merely increase the expense.

Rule discharged.

11. See Hunter v. Widdell, 20 L. J. Q. B. 100. —◆—

RADCLIFFE v. HALL.

An action for a nuisance (to which a plea of the general issue only was pleaded, before the new rules of pleading,) was referred to an arbitrator, who found that the plaintiff had not proved that the defendant was the cause of the injury, and he ordered a nonsuit to be entered, but he also ordered, that the *defen-*

CASE for a nuisance. Plea—the general issue (a). When the cause came on for trial at *York*, it was agreed to be referred. The arbitrator found, that the plaintiff had not proved that the defendant did the wrong; that the setby (which was the nuisance complained of) was an injury to the plaintiff; and he ordered that it should be removed by the defendant in a month, and that the verdict which had been entered for the plaintiff should be set aside, and a nonsuit entered. By the terms of the reference, the costs were to abide the event. The Master taxed the costs, and a rule *nisi* having been obtained by *Wightman* for reviewing the Master's taxation, the ques-

dant should remove the nuisance within a month:—*Held*, that this was a finding substantially in favour of the defendant, and that he was entitled to the expense of all witnesses who could be material under the general issue.

(a). The Master, in taxing the expenses of witnesses, according to a certain scale, cannot allow more than is actually paid for their travelling expenses.

(a) This was before the new rules of pleading.

tion was, what were the proper costs to be allowed. The objection made to the Master's taxation was, that the award being virtually in favour of the plaintiff, the Master had allowed to the defendant the costs of all the witnesses which he had brought forward, and that he ought only to have allowed the defendant the costs of those witnesses who were brought forward solely with the view of disproving the fact that the defendant was the cause of the injury.

Starkie shewed cause.—As there was only one issue, and a nonsuit is entered, the defendant is strictly entitled to costs, as if the plaintiff had been nonsuited in Court; but I only claim to have the costs up to the time of the trial at *York*.

Wightman, in support of the rule.—The parties having agreed to this mode of reference, they must be bound by it. I contend, that all the real merits were found for the plaintiff. It may be difficult to say, what are material and necessary witnesses for the defendant; but, as there were four witnesses, and only four, to prove that the defendant was not the cause of the injury, the other witnesses were wholly unnecessary, and ought not to have been allowed.

PARKER, B.—I was inclined at first to think that the defendant went too far in claiming to have the costs of all the witnesses up to the time of the award, for the arbitrator has found one of the questions against him. I agree with him as to the expenses of the witnesses up to the time of trial; but then a new mode of trial is agreed on, and he is found to be right upon one point, and wrong upon another. It appears to me now, however, that all the witnesses that could be material to the defendant for any defence under the general issue, ought to be con-

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sidered material; for, it was reasonable that he should come prepared on all points that he might think necessary. The Master reports that that was the established practice. I think it can make no difference that it was disposed of by an arbitrator, and not by a jury; and, if by the latter, he would by the old law have been allowed all costs.

Wightman.—There was another point, that the Master has allowed the costs of the witnesses according to a certain scale, which amounts to actually more than in fact was paid.

ALDERSON, B.—The Master's rule is not to allow more than is actually paid, though he may allow according to a scale. One shilling a mile for a witness one way, is what has been allowed. I think more ought not to be allowed than the expenses actually amount to.

PARKE, B.—Let it be referred back to the Master, to reduce the allowance for travelling expenses to the sum actually expended.

Rule absolute on the last point.

YOUNG v. BECK.

Where there are two pleas to the whole action, upon one of which issue is joined to the country, and upon the other judgment is given for the defendant upon demurrer, the Court will allow the defendant to strike out the general issue.

THIS was an action of trespass for arrest and false imprisonment. The defendant pleaded the general issue and also a special plea to the whole cause of action; and, upon a demurrer to the surrejoinder upon the latter plea, the defendant had judgment (a).—*Archbold*, for the defendant, moved for

demurrer, the Court will allow the defendant to strike out the general issue.

(a) See the pleadings, ante, Vol. 2, p. 402.

leave to strike out the general issue, upon payment of the costs of that issue, on the ground that the plaintiff would not be entitled to recover upon that plea, as the special plea went to the whole action.

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The Court, under the circumstances, held that he was entitled to make this application, but that it ought to have been made at chambers.

Rule granted.

HOWELL and Others, Assignees &c., v. BROWN.

SCIRE facias by the plaintiffs (as assignees of a bankrupt) directed to the sheriff of *Carmarthenshire*, upon a judgment recovered by the bankrupt in an action of debt on a *concessit solvere* in the Court of Great Sessions there, before the passing of the 11 *G. 4* & 1 *W. 4*, c. 70, for 855*l*. The declaration referred to the record as being in the Court of *Exchequer*. The defendant pleaded that there was no record of such recovery; upon which the plaintiffs took issue; and now—

Upon a plea of *nil tial record* to a declaration in *scire facias* in the *Exchequer*, on a judgment obtained in the Court of Great Sessions for *Wales* before the passing of the 11 *G. 4* & 1 *W. 4*, c. 70, the plaintiff is entitled to the judgment of the Court upon producing the certificate, and affidavit of the record being in the hands of the officer, in pursuance of the rules of *M. T. 1 W. 4*, though the actual judgment is not in Court.

Sir *W. W. Follett*, for the plaintiffs, applied for judgment.—The defendant objects that there is no record in this Court to satisfy the averment in the declaration; but there is that which is equivalent to it. By the 14th section of the act of 11 *Geo. 4* & 1 *Will. 4*, c. 70, it is enacted that all the power, authority, and jurisdiction of His Majesty's Judges and Courts of Great Session shall cease and determine at the end of the time limited by the act, and that all suits then depending in any of the said Courts of equity shall be transferred, with all the proceedings thereon, to His Majesty's Court of *Chancery* or Court of *Exchequer*, as the plaintiff, or (in default of his making choice before the last day of next *Michaelmas*

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Term), as the defendant shall think fit, and if in law, to the Court of *Exchequer*, there to be dealt with and decided, according to the practice of those Courts respectively, or of the Court from whence the same shall be transferred, which Court shall, for the purpose of such suits only, be deemed and taken to have all the power and jurisdiction, to all intents and purposes, possessed before the passing of this act by the Court from whence such suit shall be removed. The 27th section directs, that the records of the several Courts, until otherwise provided by law, shall be kept by the same persons and in the same place as before the passing of the act. Upon this act, a rule was made (a), that, in all cases in which a declaration has been delivered or filed in the Court of Sessions, a certificate should be obtained from the prothonotary or late deputy prothonotary of the Court in which the same shall be filed, and be verified by affidavit, to be intitled in this Court, and that such certificate and affidavit shall be filed with the deputy clerk of the pleas; and by another rule (b), it is ordered, that, in case any interlocutory or final judgment shall have been signed in any of the said Courts abolished by the said act, the plaintiff, on filing a certificate thereof as aforesaid, shall be at liberty to proceed thereon in like manner as if such judgment had been signed in this Court; but that, in case process of execution shall issue on any final judgment signed in any Court abolished by the said act, it shall be stated in such process in what Court final judgment was so signed as aforesaid. The plaintiffs have fully complied with those rules; the officer is in possession of the record; and this Court being now invested with all the powers and jurisdiction of the Court below, the possession of the officer is the possession of the Court. The *scire facias* is issued on the supposition that the record is transferred, and, if it is not, there is no other mode of

(a) Reg. 3, M. T. 1 Will. 4, Exch. (b) Reg. 4, M. T. 1 Will. 4, Exch.

proceeding; and therefore the question is, whether the plaintiffs, who have got a judgment of the Court of Great Sessions, have any remedy upon the judgment or not, for the Court below has no jurisdiction. A *scire facias* will not lie on the record of another Court.

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E. V. Williams, contra.—The defendant is entitled to judgment upon this issue, as upon a failure of record. The allegation is, that the judgment of the Great Sessions now remains in the Court of *Exchequer*: it ought to have been, that the record is in the hands of the officer, according to the form and effect of the statute. The act makes a distinction between suits pending and those which are finished: the proceedings in the former are removed, but not the latter; and the reason was, that there was no necessity to remove the proceedings, as the plaintiffs, having got judgment, would be entitled to issue execution at once. If the Court of Great Sessions had continued in existence the plaintiffs could at any time have issued execution upon making an application to the Court upon affidavit. A *certiorari* ought to have been issued to bring up the judgment, but at present the allegation that the judgment is in this Court, is not true.

LORD ABINGER, C. B.—I am of opinion that the plaintiffs are entitled to judgment. The act in effect says, that, when the record is removed into this Court, it is to be dealt with and decided according to the practice of this Court. The plaintiffs have a certificate of the judgment, on which they are proceeding according to the practice of this Court. The suit must be considered as pending until judgment is satisfied.

PARKE, B.—This Court has no jurisdiction except in pending suits (*a*), and therefore we must construe the act

(a) *Williams v. Williams*, 1 Cr. & J. 387.

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to mean that all unsatisfied judgments are pending suits, and then the fourth rule will apply: and therefore, though the parchment remains in the hands of the officer, he holds it for this Court.

ALDERSON, B.—We have power to adopt the practice of the *Welsh* Courts, or of this Court. If the act was only intended to apply to suits not arrived at judgment, why did the 27th section give the Court of *Common Pleas* power to amend records of fines and recoveries (a)?

Judgment for the plaintiffs, with leave for the defendants to amend the plea (so as to raise the question on the record), on payment of costs.

(a) See *Evans v. Jones*, 2 Moo. & Sc. 383; 9 Bing. 311.

BOND v. BAILEY.

The defendant is entitled to have a suggestion entered under the *London* Court of Requests Act, though the cause was tried before the sheriff by the defendant's consent, and though the motion for that purpose was not made till after the costs had been taxed, final judgment signed and execution

WHITE shewed cause against a rule which had been obtained by *Platt*, calling upon the plaintiff to shew cause why the defendant should not be at liberty to enter a suggestion under the 39 & 40 *Geo. 3*, c. 104, (the *London* Court of Requests Act,) to deprive the plaintiff of costs. He objected that it was not shewn from the affidavits that the defendant sought a livelihood in *London* at the time of bringing the action. The affidavits stated that the defendant was a silk broker, that he had a warehouse and counting-house in *Broad Street, London*, and that at the time of the cause of action accruing, and until the com-

issued: and an affidavit which states that the defendant is a silk broker, and has a warehouse and a counting house in *London*, and that he constantly lived and resided there at the time the cause of action accrued and till the commencement of the suit, sufficiently shews that he sought a livelihood in *London* at the time of the commencement of the action within the meaning of the act.

mencement of the suit, he constantly lived and resided in *New Broad Street*, and that the servants of the defendant and his partner constantly resided in *New Broad Street*. He referred to *Miller v. Williams* (a), where it was held, that, if a party's residence is out of the jurisdiction of the Court of Conscience for *London*, his occasionally underwriting a policy at *Lloyd's* coffee-house, where he has a seat, is not seeking his livelihood within the city, so as to subject him to its jurisdiction: and in *Kensett v. West* (b) it was held, that a coal merchant, residing and carrying on business at *Lambeth* in *Surry*, but keeping a counting-house in the city of *London*, for the purpose of receiving orders, is not entitled to the privilege of being sued only in the *London* Court of Requests, as a person seeking his livelihood in the city. He contended, that it must be taken from these affidavits that the defendant's residence was out of *London*, and that the counting-house was merely for the purpose of receiving orders; and that he was therefore not within the meaning of the act; and that it ought to have been more clearly shewn that the defendant lived in *London* at the time of the commencement of the action.

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Upon the affidavits in answer to the rule, which alleged that the trial took place before the sheriff by the defendant's consent, and that the costs had been taxed and final judgment signed, and execution issued, it was further contended, that the act did not apply to a case so tried before the sheriff, and also that the motion was too late.

Platt, in support of the rule, contended, that the defendant ought not to be prejudiced by the fact of his having consented that the trial should take place before the sheriff, because he could not have successfully resisted the application; and that the defendant had brought himself sufficiently within the words of the act.

(a) 5 Esp. 19.

(b) 5 D. & R. 626.

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PARKE, B.—It appears to me that it makes no difference whether the cause was tried before the sheriff or before a Judge; there is nothing in the other objections. The rule must be absolute.

The other Barons concurred.

Rule absolute.

TYNN v. BILLINGSLEY.

In an action for running down a ship, tried at Newcastle-upon-Tyne, the plaintiff having obtained a verdict, the Master refused to allow him the expense of proving certain documents, being the registers and transfers &c. of the ship; upon the ground that reasonable notice had not been given to the defendant, to allow copies to be given in evidence. The commission day was on the 4th March; notice of trial had been given on the 21st February, and the notice to admit the documents was not served till Saturday, the 28th of February, on the London agent. He, however, refused to admit the copies, and another application was made on the following Monday and the copies were produced to him, but he again refused, and a summons was then taken out, returnable the next day, but not attended. On the previous evening the agent sent off the briefs. The Court ordered the Master to review his taxation.

THIS was an action on the case for running down a ship. The defendant pleaded on the 26th of *January* last. Issue was joined on *February* the 4th. Notice of trial was given on the 21st. On *Saturday* the 28th of *February*, the plaintiff's attorney served on the defendant's attorney's agent in *London*, a written notice, calling upon him to admit certain documents necessary to prove the plaintiff's case, viz. a register of the defendant's ship; of the transfer of certain stores therein to the defendant; of the affidavit sworn by the defendant; and of another affidavit indorsed on the registry oath: the originals of which were deposited at *Harwich* Custom-House, and copies only of them were to be had at *London*. The defendant's attorney lived at *Harwich*. This notice was delivered between eleven and twelve on *Saturday*, the 28th, in the form given in the schedule to the rules of *Hilary* Term, 4 *Will. 4*, s. 20 (a), and the inspection offered was to be within 1 o'clock and 6 o'clock on that day at the attorney's office. On the following *Monday* morning an application was made, to know whether it was intended to admit these documents, as no application had been made for an inspection; the answer was, that the admission would not be made. Another application was made the same day, and the documents

were then read; but the defendant's agent still refused; alleging as a reason, that the application was so late that the plaintiff must at all events pay the costs. A summons was then taken out returnable on *Tuesday*, which was not attended, though it was sworn on the part of the defendant, that, if another summons had been taken out, it would have been attended. The commission day was on *Wednesday, March 4th*; though the trial did not take place till the *Saturday* following, at *Newcastle-upon-Tyne*. The plaintiff obtained a verdict. The Master, in taxing costs, disallowed the costs of a witness whom the plaintiff was obliged to bring from *Harwich*, for the purpose of proving the documents in question. A rule *nisi* having been obtained by *Cresswell*, for reviewing the Master's taxation—

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W. H. Watson shewed cause, upon an affidavit, which stated that the defendant's attorney, who resided at *Harwich*, had died a short time previously, and that the agent in town had to prepare the brief, and that he was engaged with another cause at *Hertford*, where the commission day was also on the 4th of *March*: that when the application was made the briefs were nearly prepared, and he was obliged to send them down by the mail on *Monday* night; that the summons was not served till the *Monday* evening; and that then, for the first time, the documents were brought to him to inspect. It was contended, that, upon the construction of the above rule, the notice was not given a reasonable time before the trial, and that the agent ought to have had more opportunity of inspecting the originals or copies, and have had time to communicate with his clients and the clerk of the late attorney in the country; and that the Master was therefore right in not allowing those costs: for, in a subsequent part of the rule, it is directed, that no costs of proving any written or printed documents shall be allowed to any party who shall

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have adduced the same in evidence on any trial, unless he shall have given such notice as aforesaid, and the adverse party shall have refused or neglected to make such admission, or the Judge shall have indorsed upon the summons, that he does not think it reasonable to require it.

Cresswell, in support of the rule.—The rule was intended to save expense, and therefore ought to be construed liberally. It is not pretended that any inconvenience would have accrued from the defendant's making the admissions required; and it is quite clear that the agent in town must have been fully acquainted with the case, and capable of saying whether it was intended to admit these documents or not, as he had the drawing of the briefs and the entire management of the cause. But here the plaintiff having succeeded, he would clearly be entitled to the costs, unless he is deprived of them by the terms of the latter part of sect. 20; and therefore, if the words "such notice as aforesaid," merely refer to the word "reasonable" in the former part of the section, the question is, whether this was not a reasonable notice under the circumstances.

PARKE, B.—I think you were too late to proceed on the 20th section. The latter part of the clause can only be taken in connection with the first part, and means such notice as is there pointed out.

Cresswell then referred to rule 6 of *Hilary Term, 2 Will. 4 (a)*, and contended, that, these being public

(a) That the expense of a witness called only to prove the copy of any judgment, writ, or other public document, shall not be allowed in costs, unless the party calling him shall, within a reasonable time before the trial, have required the adverse party, by notice in writing and production of such copy, to admit such copy, and unless such adverse party shall have refused or neglected to make such admission. Ante, vol. 1, p. 199.

documents—the copies having been produced to the defendant's attorney—and he having been required to admit such copies, and refused, the plaintiff was, under the circumstances, entitled to the costs of the copies of these instruments.

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The Court (consisting of Lord ABINGER, C. B., PARKE, BOLLAND, and GURNEY, Barons) ordered the rule to be made absolute for reviewing the Master's taxation.

Rule absolute.

SIMON v. LLOYD.

DECLARATION in *assumpsit* for 20*l.*, for goods sold and delivered, 20*l.* for money lent, and 20*l.* on an account stated.

Plea.—As to the sum of 9*l.* 15*s.* 9½*d.*, parcel of the said sums in the said declaration mentioned, the defendant says, that, after the making the said promise in the said declaration mentioned as to that sum, and before the commencement of this suit, to wit, on the 21st day of *October*, 1834, the defendant, at the plaintiff's request, made and drew upon a piece of paper having a bill of exchange stamp duty thereon of the sum of 1*s.* 6*d.*, a certain instrument, purporting to be a bill of exchange, dated the day and year last aforesaid, without a drawer's name thereto, and whereby the defendant was requested to pay to such person, or his order, in *London*, who should place his name thereto as the drawer thereof, 20*l.*, two months after the date thereof, as for value received in goods and cash; and the plaintiff then requested

To assumpsit for goods sold, &c. the defendant pleaded as to 9*l.*, part of the debt, that he, at the plaintiff's request, put his name as acceptor to a stamped bill of exchange for 20*l.*, (there being no drawer's name to it), partly for the debt, and partly for his accommodation, and delivered the same to the plaintiff, who accepted it in payment of the debt, and that the bill had not become due at the time the action was commenced. The plaintiff replied, that the bill

then remained in his hands unnegotiated and unpaid, and without any drawer's name put to it:—*Held*, that this replication was no answer to the plea, and that the plea was good. *Quære*, whether it would have been held good if it had been demurred to?

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the defendant to accept the same towards payment and satisfaction of the said sum of 9*l.* 15*s.* 9½*d.*, and for the plaintiff's benefit and accommodation as to the rest of the said sum of 20*l.* to be payable thereby; and the defendant then accordingly accepted the said bill or instrument, and delivered the same to the plaintiff, and thereby became and was liable to pay to the plaintiff, or such person who should place his name thereto as the drawer thereof, or his order, the said sum of 20*l.*, two months after the date thereof, that is to say, towards payment of the said sum of 9*l.* 15*s.* 9½*d.*, and for the plaintiff's benefit and accommodation as to the rest of the said sum of 20*l.*, [and the plaintiff then accepted and received the said bill or instrument in and towards payment and satisfaction of the said sum of 9*l.* 15*s.* 9½*d.*; and] by reason thereof, and according to the law and custom of merchants, he the said defendant then became and was and still is liable to pay to such person who has placed or shall place his name to the said instrument or bill of exchange as the drawer thereof, or his order, the said sum of money in the said instrument or bill of exchange specified, according to the tenor and effect thereof, and of his the said defendant's acceptance thereof. [And the defendant avers that the time for the payment of the money in the said bill or instrument specified had not at the time of the commencement of this suit elapsed, nor had the said bill or instrument then become due or payable (a)]. And this the defendant is ready to verify, &c. And, as to the residue of the said sums in the said declaration mentioned, the defendant says that he did not promise as therein mentioned. And of this the defendant puts himself upon the country, &c.

(a) Those parts of the plea within brackets, were amendments made by the defendant, on payment of costs; the Court expressing an opinion, when the demurrer first came on for argument, that the plea was clearly bad, as it was then pleaded.

Replication.—The plaintiff, as to the plea of the said defendant by him first above pleaded, says that the said instrument in that plea mentioned, from the time of the delivery thereof to the said plaintiff as in that plea mentioned, always hath been, and at the commencement of this suit was, and still is, in the possession of the said plaintiff, unnegotiated, without any drawer's name thereto, and unpaid by the said defendant, or any other person on his behalf; and this he is ready to verify, &c. And, as to the plea of the said defendant whereof he hath put himself upon the country, the said plaintiff doth the like.

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General demurrer, and *joinder* in demurrer.

The point stated in the margin of the demurrer was, “that the fact of the bill taken by the plaintiff on account of the debt being unnegotiated in his possession, is no answer to the defendant's plea.

R. V. Richards in support of the demurrer.—The question is, whether the receipt by the plaintiff of the blank acceptance, does not suspend his remedy for the 9*l.* 15*s.* 9½*d.* until the bill becomes due. *Kearlake v. Morgan* (a) is an authority to shew, that, even if the bill had been given for the exact amount of the debt, the plaintiff's remedy would be suspended as long as the bill was running: for, any person taking the bill would have a good title, and might recover on it against the defendant. The bill being accepted in blank, without a drawer's name, makes no difference; it might have been filled up by the plaintiff at any time, and may be now. But here, the debt was only 9*l.*, and the bill given is for 20*l.*; it therefore amounts to an agreement between the parties, that, in consideration of the defendant's lending his name to the plaintiff for the difference between the amount of the debt and 20*l.*, the

(a) 5 T. R. 513.

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plaintiff will suspend his right to call on the defendant for the debt, as long as the bill is running.

PARKE, B.—Is there any authority that the defendant would be liable, as acceptor, to the *bearer* of this instrument?

Richards.—I believe not: but, upon the pleadings, this must be taken to be an acceptance, and not a mere promise to accept. The defendant might perhaps be liable upon it as a promissory note. No objection to the form of the plea can be now taken, as the plaintiff has pleaded over; and therefore, as it must be taken upon the plea that it is an acceptance upon which the defendant would certainly be liable to an indorsee for value, the plaintiff's remedy is suspended, and the replication is no answer to it. *Burden v. Halton* (a) is distinguishable from the present case, because there the bills had been returned dishonoured to the plaintiff.

John Jervis, contra.—The plea is bad. It shews no extinguishment of the original debt. The effect of the plea is, that a bill with a blank for the drawer's name was accepted in satisfaction: but a contract not under seal cannot be extinguished by an instrument of a similar nature. A blank acceptance is only a promise to accept.

PARKE, B.—It is a promise which the acceptor cannot avoid performing. Is it not an irrevocable authority, and therefore a good consideration for forbearance? This is not an extinguishment of the debt, but a suspension of the remedy. The acceptance is irrevocable, because the defendant had no means of revoking it.

(a) 4 Bing. 454; S. C. 1 Moo. & Payne, 223.

J. Jervis.—If the bill had been once filled up, it would have been good; but when in blank, it must be looked upon as void, as no remedy is given by it. The statute expressly requires, that the acceptance shall be on the bill, but it was no bill before it was filled up. Neither does the plea show any consideration for the agreement; for it amounts to this, that the creditor agrees to suspend any remedy for three months, if, at the end of that time, the debtor pays him 9*l.* and lends him 11*l.*

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PARKE, B.—That is not the whole of the agreement. The plea shows, that a *negotiable* instrument was given which had not become due. It must be taken upon the pleadings, that it was an absolute acceptance by the defendant, and no option left to him. The plea, therefore, appears to me to be good; and unless the plaintiff amends, judgment must be for the defendant.

The other Barons concurred.

Amendment allowed only on the terms of
payment of costs as between attorney
and client, within a fortnight.

RYVES v. BUNNING.

R. V. RICHARDS shewed cause against a rule which had been obtained by *Miller* for staying proceedings in this

A bailable writ
having been issued
against a
defendant upon

an affidavit of debt for the amount of several bills of exchange, the defendant's attorney gave an undertaking for the defendant, who was not arrested: an agreement was then made, by which the plaintiff forbade any one to proceed in his name without his authority, and he agreed to give three months notice before he proceeded on the bill transactions between them, and that agreement was to set aside any writ or writs then issued against the defendant. The plaintiff's attorney afterwards gave three months notice that he should proceed, and a new writ was subsequently issued upon a fresh affidavit, upon which the defendant was arrested. Upon a motion to stay proceedings, and that the defendant might be discharged:—*Held*, that the second writ was regularly issued without discontinuing the first action, as nothing had been done upon the first writ, and sixteen months had elapsed since it was issued; but that the agreement meant that the defendant should have three months notice from the plaintiff himself, and that a notice given by the attorney was insufficient; and, on the latter ground, the defendant was discharged out of custody.

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action, and for discharging the defendant out of custody, on the ground that a former action commenced by bailable process, upon the same bills of exchange and promissory notes upon which this action was brought, was still pending; and also that notice of proceeding ought to have been given to the defendant, according to an agreement which had been made between the parties, in these terms:—"That all bill transactions between them heretofore shall stand, as has been mutually agreed between the said *H. W. Ryves* and the said *R. Bunning*, the said *H. W. Ryves* having still power to proceed against the said *R. Bunning*, if he thinks proper so to do. This act and deed to set aside all other acts and deeds that the said *H. W. Ryves* has authorized in this respect as far as relates to any one but himself; and the said *H. W. Ryves* does hereby forbid any one in his name without his further authority to molest or arrest the said *R. Bunning* in his name, or otherwise on his behalf; and the said *H. W. Ryves* does further promise to give the said *R. Bunning* three months notice of proceedings against him on the aforesaid bill transactions, should he think proper so to do; and this agreement to set aside any writ or writs that may be now standing against the said *R. Bunning* in this particular." It was now contended, in answer to the rule, that that agreement, being without consideration, was void; and from the affidavits in answer to the rule, it appeared that notice had been given by the plaintiff's attorney that the plaintiff would proceed in the action, and that he had waited several months after that before he commenced the present action to which the agreement did not apply; and that though a bailable writ was issued in the second action, there had been no arrest on the first writ, but the defendant's attorney gave an undertaking, and it was issued sixteen months ago.

Miller, in support of the rule, contended that the second action being commenced by bailable process before the

first action (which was also commenced by bailable process) was discontinued, was irregular; and he relied upon *Bishop v. Powell* (a); and, secondly, that by the terms of the agreement three months notice should have been given by the plaintiff of his intention to commence the present action.

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PARKE, B.—The first writ being sixteen months old, and not executed, goes for nothing. By the terms of the agreement the plaintiff ought personally to have given three months notice; and the notice given by the attorney was insufficient; and, upon this ground, I think that the rule ought to be made absolute.

LORD ABINGER, C. B.—I am of the same opinion.

Rule absolute.

(a) 6 T. R. 616.

— *See final r. in *Evans v. Lewis*. 22. 11. 22. 201.*

EVANS v. LEWIS.

LUDLOW, Serjt., moved to set aside the verdict for the defendant in an action of trover. The count was in the usual form. The defendant paid money into Court, under sect. 21 of the 3 & 4 Will. 4, c. 42. viz. 30*l.* for the value, and 1*l.* 10*s.* for the costs, which the plaintiff took out of Court; and the question was, whether the sum paid into Court was sufficient to cover all the damages sustained. It appeared that the defendant, who was a carrier, had delivered the goods two days after they ought to have been delivered. The plaintiff proved, that he was in want

In trover for goods, the defendant pleaded payment of money into Court, and the plaintiff replied that he had sustained more damages: the defendant paid into Court the cost price of the goods, having offered the goods in specie to the plaintiff two days only after they ought to

have been delivered. The plaintiff proved that he had sustained inconvenience and loss by not having the goods delivered at a proper time. The jury, however, found for the defendant, and the Court refused to set aside the verdict.

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of the goods, and should have made 30 *per cent.* by selling the goods by retail, and that, in consequence of the delay, he had declined receiving them. It was contended, that the plaintiff was entitled to some damages, beyond the price of the goods, for the detention of the goods for two days, and therefore that the verdict should have been for nominal damages, as the subsequent delivery did not prove the original wrongful detention; and *Buller's Nisi Prius* (a) was cited, where it is said, "If a man take my horse and ride him, and after deliver him to me, yet I may have trover against him, for the riding was a conversion, and the redelivery will only go in mitigation of damages."

Lord ABINGER, C. B.—There is no ground for this motion. The case cited is correct, but the jury are not bound by the cost price. I believe it has been held that special damage is not recoverable in trover; here no special damage was laid: I do not know that it can be recovered. The act of Parliament says, that money may be paid in by way of compensation or amends; here the money was so paid in, and the jury thought that it was sufficient.

ALDERSON, B.—The small delay in delivering the goods would not necessarily make any variation in the value. The jury thought that the plaintiff was wrong in not accepting the goods, and the costs therefore ought to fall upon him.

Rule refused.

(a) *Buller's Ni. Pri.* p. 46, citing 1 *Danv.* 21, *Countess of Rutland's case*.

END OF EASTER TERM.

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ADMINISTRATOR.

In an action against an administrator, the defendant, after obtaining time to plead upon the usual terms, pleaded a judgment recovered since the commencement of the action, but did not aver that there were no assets *ultra*. The Court gave leave to the plaintiff to sign judgment as for want

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of a plea; the defendant having since the commencement of the action admitted by letter the possession of assets sufficient to cover the judgment, and also the plaintiff's demand. *Roberts v. Wood*, 799

AFFIDAVIT.

See ILLITERATE DEPONENT.

1. Where long affidavits are filed in support of a motion, a great part of which is unnecessary, the Court will refer them to the Master, and make the party applying pay the costs of the unnecessary affidavits. *Lewis v. Woolrych*, 692

2. An affidavit, in which the word "oath" was omitted, was held insufficient. *Oliver v. Price*, 261

3. "*Phillips*, assignee &c.," is an irregular mode of describing a plaintiff in intituling an affidavit. *Phillips v. Hutchinson*, 20

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6. "Assessor" is not a good description of a deponent in an affidavit. *Nathan v. Cohen*, 370

7. If an affidavit be joint, an objection to the description of one of the deponents does not render the statements of the others inadmissible. *Ib.*

8. If an affidavit purports to be signed by a deponent, it will be no objection that it is signed in a foreign character, and there is no statement in the jurat to shew that the deponent is a foreigner, and that the writing in question is his signature. *Ib.*

AFFIDAVIT (ENTITLING).

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1. An affidavit intituled *G. Shrimpton v. Wm. Carter* the elder, sued as *Wm. Carter*, the cause being *G. Shrimpton v. Wm. Carter*, was rejected as being badly intituled. *Shrimpton v. Carter*, 648

2. An affidavit of debt sworn before a commissioner need not be intituled in any Court. *Urquhart v. Dick*, 17

3. An affidavit in support of a motion for entering up judgment on a warrant of attorney (given when no suit is pending) need not be intituled in any cause. *Davis v. Stanbury*, 440

4. In intitling an affidavit of service of a rule to compute, the Christian name of the plaintiff as well as of the defendant must be introduced. *Anderson v. Baker*, 107

5. The Court declined to act upon an affidavit which was intituled *A. v. B.*, executor &c., without specifying the party of whom the defendant was executor. *Clark v. Martin*, 222

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Affidavits sworn in opposition to one rule, on which the allegations in them may be immaterial, cannot be used without re-swearing, in opposition to another rule, on which they may become material, although the same question might be intended to be raised on the first rule, which was actually raised on the second. *Quelly v. Boucher*, 107

AFFIDAVIT (OF DEBT).

See BAIL-BOND, 1.

1. If the affidavit of debt on a bill of exchange does not state the amount, the bail-bond will be set aside with costs. *Molineux v. Dorman*, 662

2. An affidavit of debt, that the defendant is indebted upon and by virtue of a mortgage deed in the sum of 500*l.*, by which the defendant covenanted to pay that sum at a certain day now past, is sufficient, without averring that the money was not paid at the appointed day. *Masters v. Billing*, 751

3. The date of bills of exchange need not be stated in an affidavit to hold to bail, if it appear in the affidavit that the day of payment of the bills is passed. *Shirley v. Jacobs*, 101

4. An affidavit of debt, for goods sold and delivered to, and for money paid and laid out for, *S.*, the wife of the defendant, before his intermarriage with her:—*Held*, insufficient. *Gray v. Shepherd*, 442

5. An affidavit of debt made by a person who described himself as agent and collector to the plaintiff, an hotel-keeper:—*Held*, sufficient. *Short v. Campbell*, 487

6. An affidavit sworn before the deputy signer of the bills of *Middlesex*, before the Uniformity of Process Act came into operation, was held sufficient to warrant an arrest upon a *capias* issued after the passing of that act. *Beck v. Young*, 280

AFFIDAVIT (OF DEBT).

7. *Semble*, that if in an affidavit of debt for principal and interest, a sum and date are mentioned, from which interest can be computed, it is not essential that the amount of interest claimed should be specifically mentioned. *Rogers v. Godbold*, 106

8. An affidavit of debt on a covenant in a deed for payment of a certain sum at a particular day, which is sworn to have passed, and that the defendant is indebted in the amount, is sufficiently positive, though it is not in terms alleged that the money was not paid at the day appointed. *Lambert v. Wray*, 169

9. An affidavit of debt on a bill of exchange, which states that the defendant is indebted on a bill, which was payable at a day past, is sufficient, without stating that the bill was not paid when due, or that it is still unpaid. *Phillips v. Turner*, 163

10. An affidavit of debt for 500*l.* for money lent, and interest thereon, and on an account stated, without noticing a contract for interest:—*Held*, sufficient. *Pickman v. Collis*, 429

11. An affidavit of debt claiming interest is sufficient, though it neither states the amount of the principal, nor the time when it began to run. *White v. Sowerby*, 584

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1. In an action for tithes, the plaintiff introduced two counts into the declaration: one, for the treble value of tithes not set out, the other, for the same tithes bargained and sold:—*Held*, that this was a violation of the rule of *H. T. 4 W. 4*, reg. 1, s. 5, and the Court ordered the last count to be struck out, with costs; but bound the defendant to agree not to set up a composition at the trial, or that, if he did, the declaration might be amended. *Lawrence v. Stephens*, 777

2. A mistake in a *ca. sa.* in stating the amount recovered, may be amended on payment of costs. *Arnell v. Weatherby*, 464

3. The Court refused to allow the christian name of a plaintiff to be amended after issue joined. *Moody v. Aslatt*, 486

4. Where a party is allowed to amend on condition of paying costs, but he amends and proceeds without such payment, he is still not liable to an attachment. *Turner v. Gill*, 30

5. A plaintiff a few days previously to the assizes obtained a judge's order, giving him liberty to amend, and the defendant was to have two days' time to plead anew. The plaintiff afterwards delivered the issue, and took no further notice of the order, either by amending or rescinding it; and though the defendant returned the issue as irregular, the plaintiff proceeded to trial, and got a verdict. The Court refused to set aside the verdict as irregular. *Black v. Sangster*, 206

6. Where the form of certificate to

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be made by commissioners for taking the acknowledgments of married women to deeds prescribed by the 84th section of the 3 & 4 Will. 4, c. 74, does not suit the peculiar circumstances of the case, the Court of *Common Pleas* will make a special order for the alteration of the form in that case. *In re Sarah Luke*, 112

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APPEAL (ADJOURNMENT OF).

The 9 Geo. 1, c. 7, s. 8, only applies to the first sessions after executing the order of removal, and therefore the Court will not interfere with the discretion of the magistrates at the second, as to adjournment, if it is in furtherance of a reasonable practice. *Rex v. the Justices of Monmouthshire*, 306

APPEAL (NOTICE OF).

If a regular notice of appeal has been given for one sessions, and the appeal be adjourned at the instance of the appellants, after hearing counsel on both sides, it is not necessary to give a strictly regular notice of trial for the following sessions. *Rex v. the Justices of Gloucestershire*, 298

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See BAIL-BOND, 2—DECLARATION, 1—JUDGMENT.

ARBITRATION.

See AWARD—COSTS, 1.

1. The refusal of an arbitrator to examine witnesses is sufficient misconduct on his part to induce the Court to set aside his award, though he may think that he has sufficient evidence without them.

The authority of an arbitrator cannot be revoked after he has made his award. *Phipps v. Ingram*, 669

ARBITRATION.

2. If parties agree to refer, there being an action pending, without a Judge's order, the reference is within the 9 & 10 Will. 3, c. 15; and an application to set aside the award must be made before the end of the term next after its publication. *Rushworth v. Barron*, 317

3. Where, from the misconduct of one of the parties to an award, the submission cannot be made a rule of Court, so as to enable the opposite party to make it a rule of Court before the last day but one of the first term after the award, the time for a motion to set it aside will be enlarged until the following term. *Re-Arbitration of Perring and Keymer*, 98

4. Where the time for making an award is enlarged by the arbitrator, without strictly complying with the directions of the order of reference, but the time is subsequently again regularly enlarged, with the consent of the parties, no objection can be made to the award on account of the first irregular enlargement of the time. *Benwell v. Hinzman*, 500

5. The decision of an arbitrator (though not a barrister) is final, though it can be clearly shewn that his award is founded on a misapprehension of law. *Ashton v. Poynter*, 201

6. Where a mixed case of law and fact is referred to a non-legal arbitrator, and he decides absolutely upon them without raising any question upon his award, his decision is final, and the Court will not entertain a motion for reviewing such decision, either as to the facts or the law. *Jupp v. Grayson*, 199

7. An arbitrator, to whom all matters in difference are referred, has no right to state facts for the opinion of the Court, unless there is a special direction given to him to do so; in such a case, the opinion formed by the arbitrator is absolutely final. *Barrett v. Wilson*, 220

ARREST.

ARREST.

See AFFIDAVIT OF DEBT, 6—MISNOMER, 1, 2.

1. A defendant who has been wrongfully arrested upon a *Sunday*, upon a charge of forgery, without any warrant, may be lawfully arrested upon civil process, as he is leaving the police office after he has been ordered by the magistrate to be discharged. *Jacobs v. Jacobs*, 675

2. *Semble*, that, in order to constitute an arrest, the warrant must be produced; but the closest watching of the defendant is not sufficient. *Robins v. Hender*, 543

ARREST (OF JUDGMENT).

See DECLARATION, 3—JUDGMENT—MISNOMER, 1.

The record in an action for slander stated that the writ issued on the 4th of *June*, and that the words were spoken on the 27th:—*Held*, that this discrepancy on the record was no ground for arresting the judgment. *Steward v. Layton*, 430

ARREST (SECOND).

See BAIL-BOND, 3.

A defendant having been arrested for a debt, and having put in special bail, settled the action by giving a bill of exchange for 30*l.*, drawn by a third person and accepted by himself, and the plaintiff then discontinued the action. The bill being dishonoured, the plaintiff again arrested the defendant on the bill:—*Held*, that the second arrest was regular. *Hamber v. Cooper*, 671

ARREST (WITHOUT PROBABLE CAUSE).

See AWARD, 4.

1. A defendant was arrested upon a writ, in which the sum of 37*l.* was by mistake inserted as the sum for

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which bail was to be taken; but upon the back of the writ the plaintiff demanded 27*l.* only, which was the amount really claimed. The officer was informed of the mistake, and desired to arrest for the smaller sum. The defendant was arrested and sent to prison; and the plaintiff, at the trial, made out a claim to the extent of 28*l.*: but there being no count in the declaration to warrant part of the demand, he agreed to forego that part to prevent further litigation, and take a verdict for 20*l.* only. The Court, under these circumstances, refused to allow the defendant his costs under the 43 *Geo. 3, c. 46, s. 3*. *Preedy v. Macfarlane*, 458

2. The defendant was arrested for 20*l.* and the plaintiff recovered only 8*l.*, but it appeared that the price of the goods for which the action was brought had been agreed upon in writing, which the plaintiff, by accident, was unable to prove at the trial, and there was contradictory evidence as to the value of the goods:—*Held*, that the defendant was not entitled to costs under the 43 *Geo. 3, c. 46*. *Shatwell v. Barlow*, 709

3. Two defendants having been arrested for a sum of 45*l.*, the plaintiff at the trial recovered only 21*l.* Part of the demand was for a sum of 19*l.* 10*s.*, which it was stated by a witness he had seen paid on a particular day, and a receipt was put in, from which it appeared that the money was paid on a former day. The jury, under the circumstances, disallowed that part of the plaintiff's demand, and also made a small deduction from the other part. It was not denied, however, by the defendants that the money was due, and it was positively sworn by the plaintiff that it was due from the defendants:—*Held*, that the defendant was not entitled to his costs under the 43 *Geo. 3, c. 46*. *Smith v. Smith*, 733

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See SHERIFF.

Where the writ was returnable on the 22nd, and the plaintiff did not declare *de bene esse* till the 30th, the Court on setting aside an attachment against the sheriff on payment of costs, refused to order the attachment to stand as a security, it not appearing that the plaintiff had lost a trial. It lies on the plaintiff in such a case to shew that he has lost a trial. The affidavit of the officer need not deny collusion with the bail, nor need the bail deny collusion with the officer. *The King v. the Sheriff of Middlesex, in a Cause of Finlay v. Rallett,* 194

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1. A rule for an attachment against an executor for not accounting pursuant to a rule of Court was made absolute, though that rule had not been personally served, upon an affidavit that the defendant kept out of the way to avoid being served, and that a copy had been left at the house with the daughter of the defendant. *In re Edward Barwick,* 703

2. A party cannot have a rule absolute, in the first instance, for an attachment for not paying costs, pursuant to a rule of Court, where those costs form part of a rule, for disobedience to which a rule *nisi* only for an attachment can be granted. *Ex parte Townley,* 39

3. An application to set aside an attachment may be made by one of the bail on his own affidavit denying collusion, without an affidavit from the other bail.

Where there has been a default, an attachment against the sheriff may be obtained, though the defendant is surrendered before the attachment is moved for. *The King v. The Sheriff of Middlesex in a Case of Ridgway v. Porter,* 186

4. A personal service of the rule of Court must be made to ground an attachment for nonpayment of money pursuant to a Judge's order, which is afterwards made a rule of Court; and service of the order and *allocatur* are not sufficient, nor is service of the rule on the London agents of the attorney sufficient: and for this defect an attachment, issued at the end of January, and executed on the 12th of February, was set aside in *Trinity* term following. *Woollison v. Hodgson,* 178

5. An attorney's bill having been ordered to be taxed after the client had given a bill of exchange for the amount, it was found he had been overpaid, and he was ordered to refund the overpayment to the client, and also by a subsequent order to pay the costs of taxation, more than a sixth having been taken off. Upon the application of the attorney to be allowed to pay these sums to the holder of the bill of exchange (which had been dishonoured) instead of his client, he was ordered to do so within a week, or, in default, that an attachment should issue:—*Held,* that no demand of these two sums was neces-

sary to ground an attachment, but that it was his duty to seek the holder of the bill, and pay the money to him. *Woollison v. Hodgson*, 178

6. Where the party against whom a rule *nisi* for an attachment was obtained, appeared, and objected that the rule *nisi* had not been personally served, the Court, notwithstanding, made the rule absolute. *Levy v. Dumcombe*, 447

7. In order to obtain an attachment for nonpayment of costs pursuant to the Master's *allocatur*, it must appear, by the affidavit, that the persons denying the payment are those mentioned in the *allocatur*. *France and Others v. Wright*, 325

8. Where a rule of Court directs costs to be paid to the party or his attorney, a demand not made by the attorney who had conducted the cause in London, but by the attorney in the country who employed him, is sufficient. *Dennett v. Pass*, 632

9. An attachment for nonpayment of costs may be obtained on the 22nd April, although the affidavit does not shew that any demand was made since the 2nd of February. *Rex v. Rogers*, 605

10. Where it is clear that the copy of the rule and *allocatur* have come to the hands of the defendant, an attorney, the Court will grant a rule *nisi* for an attachment, although strict personal service has not been effected. *Phillips v. Hutchinson*, 583

11. A Judge's order directed, that, on payment or tender of the debt and costs to the plaintiffs, their attorney or agent, the plaintiffs should deliver up to the defendant certain deeds held by the plaintiffs as a security. An attachment was moved for on an affidavit that the money was tendered to the plaintiffs' attorney's agent, and the deeds demanded, but that they had not been delivered:—*Held*, that the affidavit was insufficient, and that no-

tice should have been given to the plaintiffs, and a demand made personally of them. *Evans and Wife v. Millard*, 661

12. A rule for an attachment for nonpayment of costs, pursuant to the Master's *allocatur*, between attorney and client, is *nisi* in the first instance. *Green v. Light*, 578

13. In order to obtain an attachment for nonpayment of costs, pursuant to the Master's *allocatur*, a demand is not necessary, if the party sought to be served by his violence prevents the demand from being made. *Wenham v. Downes*, 573

14. In order to obtain an attachment, it is not sufficient that all the necessary steps are taken, partly at one time and partly at another. *Rogers v. Twissel*, 572

15. In order to obtain an attachment for nonpayment of costs, pursuant to the Master's *allocatur*, it is not indispensably necessary that a copy of the rule and *allocatur* should be left on the person of the defendant. *Rex v. Koops*, 566

16. Personal service of the rule for payment of costs is necessary in order to obtain an attachment although the defendant is an attorney. *Albin v. Toomer*, 563

17. An attachment cannot be obtained for nonpayment of costs, pursuant to the Master's *allocatur*, if there was no undertaking, in the Judge's order for taxation, to pay what should be found due. *Harrison v. Ward*, 541

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1. An attorney, not having had his name enrolled in the alphabetical book kept at the Prothonotary's Office, pursuant to 37 Geo. 3, c. 90, s. 27, will not be allowed to enter it *nunc pro tunc* after an action for penalties has been commenced. *Ex parte Swift, in the case of Matthew v. Swift*, 636

2. It is no ground of demurrer to a declaration in an action by an attorney that he seeks to recover for "materials" supplied by him to his client. *Fisher v. Snow*, 27

3. Where an attorney is in contempt by disobeying a rule of Court, the proper course of proceeding against him is by moving for an attachment, and not by applying to strike him off the roll. *Ex parte Townley*, 39

4. It is no ground for disallowing to the plaintiff's attorney his costs of conducting the action, that he was not on the roll of attorneys of this Court, if it appears that he conducted the proceedings in the name of a London attorney, who was an attorney of the Court. *Goodner v. Cover*, 424

5. An attorney cannot be re-admitted without deposing to his having given notice to the Stamp Office of his intention to apply for readmission. *Ex parte Bridgman*, 371

6. Where an attorney brings several *qui tam* actions, and, after their commencement, makes an offer to the defendant to compromise them, it is no ground for striking him off the roll. *Smith v. Gillett*, 364

7. Where a clerk has been article'd to a second master pursuant to the 23 Geo. 2, c. 46, s. 9, and the affida-

vit of such articles has not been filed within three months after their execution, in accordance with section 3 of that statute, he cannot be admitted, nor can such affidavit be filed *nunc pro tunc*. *Ex parte Joy*, 342

8. If an attorney practises after the expiration of his certificate, even though with the hope of taking one out, he cannot be re-admitted without payment of the arrears of duty for the years during which he has practised, and something more than a nominal fine. *Ex parte Philpot*, 339

9. Where an attorney, through the negligence of his clerk, has omitted to make the entry pursuant to the 37 Geo. 3, c. 90, s. 27, in due time, the Court will allow that entry to be made *nunc pro tunc*, if he has taken out his certificate regularly, and paid the duty for that year. *Ex parte Fry*, 338

10. Where an attorney disobeys a rule of Court, requiring him to do a particular act, an application cannot in the first instance be made to strike him off the roll; but a rule *nisi* for an attachment may be obtained.

If by the same rule he is required to pay certain costs, and a clause is also introduced into it authorizing the issue of an attachment in case of non-payment, that may at once issue although a rule *nisi* only will be granted for disobedience to the other part of the rule.

A bankrupt's certificate does not remove an attorney's liability to an attachment for not duly investing his client's money. *Ex parte Grant*, 320

11. Directing an attorney to employ a proctor to obtain probate of a will is not such an employment of him in the character of an attorney as will give the Court summary jurisdiction over him, as to money received by him to pay the proctor. *Ex parte Comie*, 600

12. On an application against an

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attorney for an attachment for his contempt of a Judge's order, made a rule of Court; the Court will take judicial notice of his being on the roll. *Ex parte Carolina Hore*, 600

13. If the agent of an attorney neglect to take out his certificate, and the latter continues in ignorance of the neglect to practise, he may be re-admitted on payment of a nominal fine, and the arrears of duty. *Ex parte Thorpe*, 592

14. A motion to compel an attorney to answer the matters in an affidavit cannot be made on the last day of term. *Re Turner*, 557

ATTORNEY (ADMISSION OF).

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ATTORNEY (CHANGING).

If the attorney on the record is changed, without an order for that purpose, but the opposite party treats the new attorney as the attorney in the cause, he cannot afterwards object that no order was obtained. *Farley v. Hebbes*, 538

ATTORNEY (RE-ADMISSION OF).

See ATTORNEY 5, 8, 13.

An attorney, who through inadvertence has practised without his certificate, cannot be re-admitted without an affidavit, shewing that a notice has been given to the *Stamp Office* of his intention to apply for re-admission. *Ex parte Franks*, 319

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ATTORNEY'S BILL.

See PLEA, 10—TAXATION.

1. A summons to tax an attorney's bill, though it was served, was held not to operate as a stay of proceedings from its return, so as to prevent

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the attorney issuing a writ, the defendant not having signed a consent in the book to pay the amount of the taxation. *Williams v. Roberts*, 512

2. After the lapse of nine years, the Court will not compel an attorney to re-deliver bills for business done by him, without some suggestion of fraud. *Manning v. Brown*, 31

3. In an application to tax an attorney's bill, the Court will take judicial notice of his being on the roll. *Ex parte King*, 41

4. In such an application, however, it must be sworn that there are taxable items in the bill, although the bill itself is exhibited. *Ib.*

ATTORNEY'S CERTIFICATE.

See ATTORNEY AND CLIENT, 5.

If an attorney neglects to take out his certificate between the 15th *November* and the 16th of *December*, but before the expiration of the year he takes it out, he is entitled to recover his costs for business done during the uncertificated interval, if his neglect has not been wilful. *Bowler v. Brown*, 80

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—TAXATION—UNQUALIFIED PRACTITIONER.

1. A bailable writ having been issued against a defendant upon an affidavit of debt for the amount of several bills of exchange, the defendant's attorney gave an undertaking for the defendant, who was not arrested: an agreement was then made, by which the plaintiff forbade any one to proceed in his name without his authority, and he agreed to give three months' notice before he proceeded on the bill transactions between them, and that agreement was to set aside

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any writ or writs then issued against the defendant. The plaintiff's *attorney* afterwards gave three months' notice that he should proceed, and a new writ was subsequently issued upon a fresh affidavit, upon which the defendant was arrested. Upon a motion to stay proceedings, and that the defendant might be discharged:—*Held*, that the second writ was regularly issued without discontinuing the first action, as nothing had been done upon the first writ, and sixteen months had elapsed since it was issued; but that the agreement meant that the defendant should have three months notice from the *plaintiff* himself, and that a notice given by the *attorney* was insufficient; and, on the latter ground, the defendant was discharged out of custody. *Ryees v. Bunning*, 817

2. An attorney is not justified in proceeding with an action after it has been settled between the parties themselves, though it is known that costs have been incurred, and that the plaintiff himself is not in a condition to pay them; it must be shewn affirmatively, that the settlement was come to for the purpose of cheating the attorney. *Jordan v. Hunt*, 666

3. Rule 23 of 1 *Reg. Gen., H. T.* 2 *Will.* 4, gives the attorney a lien on a judgment obtained by him for his costs as *between attorney and client*. *Watson v. Mascall*, 638

4. An attorney who gives a false residence of his client, without using proper means to ascertain whether it is correct or not, subjects himself to the costs which may be occasioned by moving for an attachment against him; but he is not liable to pay the costs of the action, if he is *bond fide* unable, after proper inquiry, to give his client's residence. *Neal v. Holden*, 493

5. *Seem*, that if an attorney has been admitted and does not take out his certificate for a year, he need not be re-admitted previous to taking it

AWARD.

out; but whether he need or not, if he has taken out his certificate under such circumstances, the client's interest will not be affected. *Hilleary v. Hungate, Bart.*, 56

AUCTIONEER.

See INTERPLEADER, 14—PLEA, 2.

AWARD.

See ARBITRATION — LANCASTER (COURT OF C. P. OF), 2—VERDICT, 2.

1. Personal service must be effected before an attachment can be obtained for non-performance of an award on which an action will lie. *Richmond v. Parkinson*, 703

2. If a party proceeds to enforce an award by attachment and afterwards by action, the attachment may be set aside, but only on the terms of the defendant's giving a bail-bond. *Earl of Lonsdale v. Whinnay*, 263

3. A rule for setting aside an award must appear, on the face of it, to be drawn up on reading the award itself or a copy of it; and the Court will not allow it to be amended.

Where a rule for setting aside an award was drawn up on imperfect materials, and was therefore discharged; the Court, under special circumstances, allowed a new rule.

In the *King's Bench*, the Court may look at the record on discussing a motion for a new trial, although the rule is not drawn up on reading it; therefore, the Court may look at the record on an application to set aside an award made pursuant to an order of *Nisi Prius*, although the rule is not drawn up on reading it.

If it clearly appear, from reading an award, that the arbitrator intended to leave a particular question of law open, the Court will consider it, although in terms the arbitrator may in one part of his award have determined it. *Sherry v. Oke*, 349

4. If an arbitrator, to whom a cause

is referred by order of *Nisi Prime*, takes no notice in his award of a power given him by the order to give the defendant his costs, on the ground of an excessive arrest, but does dispose of the general costs of the cause, the Court will not interfere to give the defendant his costs. *Greenwood v. Johnson*, 606

5. Where an award found that a balance of 17*l.* was due from the plaintiffs to the defendant, but contained no order on the former to pay the money, the Court refused to grant an attachment for nonperformance of the award. *Scott v. Williams*, 508

BAIL.

See ATTACHMENT AGAINST THE SHERIFF — ATTACHMENT, 3 — BAIL-BOND, 4 — PROCEDENDO — POWER OF PRINCIPAL — UNIFORMITY OF PROCESS ACT, 2—SCIRE FACIAS, 3.

1. A notice to justify at eleven, all parties appearing at ten:—*Held*, sufficient.

A notice of justification, which omitted to state where the bail resided for the last six months, and also whether they were householders or freeholders:—*Held*, not to be cured by the affidavit of justification according to the old rules, though it contained those requisites: and time to amend was refused, the bail having been put in too late; and also the costs of opposition. *Beal's Bail*, 708

2. An affidavit of justification, which stated that the property of the bail consisted of household furniture and effects, was held not to be sufficient without stating where the property was. *Cooper's Bail*, 692

3. Where bail was put in in this form—"Ety, by Cole," the former not being an attorney of this Court, though the latter was, the proceedings were held to be informal, but time was given to amend. *Marden's Bail*, 654

4. An affidavit of justification of bail, which merely states the bail "possessed" instead of "worth," will not be allowed to be amended. *Naylor's Bail*, 452

5. The want of entry in the book of the notice of exception is waived by giving notice of justification.

A notice of justification, which stated that the bail had resided for the last six months at the parish of *W.* without stating the street, &c., held bad.

Costs of opposition on technical grounds are not allowed. *Hanwell's Bail*, 425

6. An affidavit of justification of bail stated that the bail was a house-keeper at *S.*, but did not state that he resided there:—*Held*, that this was a sufficient deviation from the form given by the rule of *T. T. 1 Will. 4.*, to deprive the defendant of the costs of justification. *Heald's Bail*, 423

7. A two day's notice of justification by a prisoner, accompanied by an affidavit according to the rule of *Trinity* term, 1 *Will. 4.*, is bad, unless it expresses that he is a prisoner. *Bullen's Bail*, 422

8. Keeping a brothel is not of itself a ground for rejecting bail. *Gouge's Bail*, 320

9. "He's" is sufficient in an affidavit of justification instead of "he is."

The name of a township, without the name of a street, stated to be in a certain parish named in the notice of bail, is sufficient.

It is sufficient for a bail to swear to property over and above "what will pay his just debts."

"Debts," without describing them as "book debts," is sufficient.

"Yeoman" is a good description of a bail. *Lanyon's Bail*, 85

10. If one of the bail below consents to time being given to the defendant to perfect bail above, his act is binding upon both. *Howard v. Bradberry*, 92

11. Although bail are unopposed, the Court will not allow them to justify if it has been satisfied in a previous case that they are unfit. *Laporte's Bail*, 110

12. Upon the justification of bail in a country cause, one of the bail was allowed time to explain respecting some property which it was alleged was mortgaged: this being afterwards done—*Held*, that the defendant was entitled to the costs of justification. *Grant's Bail*, 165

13. If bail are opposed on the ground of the affidavit of justification being defective in not swearing that they are "worth" the requisite amount; but it appears that the bail are, in fact, sufficient, and afterwards justify, the defendant will not receive the costs of justifying bail, but he will not pay the costs of opposing. *Popjoy's Bail*, 170

14. Bail coming up a second time to justify must pay or deposit the costs of a former unsuccessful attempt; and where costs are payable, the defendant's being in prison will not excuse him from payment. *Pasmore's Bail*, 214

15. Where bail made a motion in the name of an attorney, who denied having given any authority to allow his name to be used, the Court discharged the rule; but refused to make an order for costs against the person making the affidavit, on the ground that he was not before the Court. To obtain such costs, a special application must be made against him. *Norton v. Curtis*, 245

16. The 4th rule of *Trinity* term, 1 *Will.* 4, which directs, that, if a plaintiff does not give one day's notice of exception, where the bail justify by affidavit under the new rules, the recognizance may be taken out of Court, does not apply where the bail are put in in that mode after the regular time for putting in bail has ex-

pired, for then the bail must actually justify as formerly, before a motion can be made to set aside proceedings upon the ground that bail have been put in and justified. *The King v. Wilson*, 255

BAIL (ADDING).

See *MERITS*, 4.

BAIL (RELIEF OF).

See *BAIL*, 10—*BAIL-BOND*, 6.

1. Where a defendant has been committed to *Newgate* by commissioners of bankrupt, the *Common Pleas* cannot bring him up that he may be rendered in discharge of his bail, but they will enlarge the time for his render, although not "till he has passed his last examination." *Waugh v. Ashford*, 123

2. Where bail would be fixed by an indulgence granted by the Court, such terms will be imposed upon the plaintiff as will give the bail an opportunity of freeing himself from his liability. *Bradley v. Bailey*, 111

BAIL-BOND.

See *CAPIAS*, 8.

1. After a rule *nisi* had been obtained for cancelling a bail-bond for a defect in the affidavit to hold to bail, the plaintiff offered to consent to a Judge's order to the same effect, the costs to be costs in the cause and no action to be brought:—*Held*, that, notwithstanding this offer, the defendant was entitled to have his rule made absolute with costs. *Clarke v. Crockford*, 693

2. Where a bail-bond is cancelled, the plaintiff is not bound to accept an appearance by the defendant, though the entry of it was mentioned as a condition in the rule *nisi*. *Perring v. Turner*, 15

3. A defendant having been arrested, the plaintiff, on the ground of

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some irregularity, discontinued the action, and paid the costs. He again arrested the defendant by leave of a Judge, and the sheriff, not having had notice of the discontinuance of the first action, detained the defendant for some time on both writs; but it appeared that the defendant had in fact suffered no inconvenience, as, before he tendered bail on the second writ, the sheriff had notice served on him of the discontinuance of the first action. The Court, under these circumstances, refused to interfere, or to order the bail-bond to be cancelled, on the ground that the first action was not completely discontinued. *Price v. Day*, 463

4. A plaintiff can in no case have the bail-bond to stand as a security, (though it may clearly appear that, in point of fact, he has been prevented from going to trial by bail above not being perfected in due time), unless he has declared *de bene esse* against the original defendant; neither can the Court impose terms on the defendant where the application is by bail to stay proceedings on payment of costs, bail above being perfected. *Call v. Thelwell*, 445

5. A bail-bond was given to the sheriff on the 24th of November, and it recited that the defendant had been arrested on the 17th: bail above not having been put in within due time after the 17th, the plaintiff took an assignment of the bail-bond. Upon motion to set aside the assignment as having been made too early, upon an affidavit that the recital in the bond was false—that, in fact, no arrest was made, but only a letter sent, and that therefore the writ could not be said to be executed till the 24th, when the bond was given, the Court refused to interfere. *Call v. Thelwell*, 443

6. The rule of *M.*, 59 *G.* 3, *K. B.* is now adopted into the practice of the Court of *Exchequer*; and, there-

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fore, bail or sheriffs, applying for relief, must comply with the terms of that rule. An affidavit by bail, applying to stay proceedings on payment of costs, which stated that the application was made for their own indemnity, instead of *only* indemnity, was held insufficient. *Call v. Thelwell*, 444

7. It is not necessary that the assignment of a bail-bond by the sheriff under the 4th *Anne*, c. 16, s. 20, should be attested by the two witnesses, in whose presence it must be made at the time of the assignment. *Philips v. Bartow*, 381

BANKRUPT.

See BAIL (RELIEF OF), 1.

In answer to an action by a landlord against the assignees of a bankrupt for rent, the latter may plead that the term did not vest in them; and to avoid the effect of 1 & 2 *Will.* 4, c. 56, s. 25, also, that it did vest, but that they abandoned it, and were not therefore liable. *Thompson v. Bradbury*, 147

BARRISTER.

See ARBITRATION, 5.

BEDCHAMBER (LORD OF).

See PRIVILEGE FROM ARREST, 3.

BILL OF EXCHANGE.

See PLEA, 2, 11, 14, 16, 21, 22—
REPLICATION, 3, 4, 5, 6—STAYING
PROCEEDINGS, 2—VENUE, 10.

BISHOP.

See SEQUESTRATION, 1.

BOND.

See PLEA, 1.

BREACH OF CONTRACT.

See INTEREST.

CAPIAS.

See AFFIDAVIT OF DEBT, 6—INDORSEMENT ON PROCESS—SHERIFF'S RETURN.

1. If the defendant's residence is sufficiently described in a *capias*, with the exception of the county, that defect is supplied by the direction to the sheriff. *Perring v. Turner*, 15

2. A *capias*, which was in this form, "if *se* shall be found in your bailiwick," instead of "if *she* shall," &c., was held not to be so defective as to warrant the Court in discharging the defendant from custody. *Sutton v. Burgess*, 489

3. An indorsement on the copy of a *capias* served on a defendant at the time of the arrest, which required the defendant to pay the debt within four days from the arrest or service thereof:—*Held*, sufficient. *Ib.*

4. If the warning in a *capias* is placed at the foot of the writ, it is only necessary in the body to introduce the words "hereunder written," and not "indorsed hereon" besides. *Bridgman v. Curgenvon*, 1

5. The omission of immaterial particulars in the writ of *capias* is not an irregularity of which the Court will take notice, if the omissions do not alter the meaning of the writ. *Forbes v. Mason*, 104

6. *Quære*, whether it is necessary to state in a *capias* the county in which a defendant is supposed to reside? *Border v. Levi*, 150

7. A writ of *capias* directed to the "sheriffs" of *Middlesex* is irregular. *Jackson v. Jackson*, 182

8. A defendant being arrested on a writ, which stated the action to be trespass on the case upon promises, an application was made by the defendant to a Judge to be discharged, on the ground that the form of action was misdescribed, but it was refused. He then gave a bail-bond, and special

bail not having been put in in due time, the plaintiff took an assignment of the bail-bond and proceeded upon it. The bail, having taken out summonses to stay proceedings without success, applied to the Court to set aside the *capias* against the original defendant: the Court refused to interfere. *Gurney v. Hopkinson*, 189

9. A writ of *capias* to answer the plaintiff in an action of *trespass on the case* upon promises is merely irregular and not void, and a defendant, to avail himself of the objection, must apply in proper time. *Ib.*

10. The Court will not amend a writ of *capias* in the direction.

Semble, that *Middlesex*, (put by mistake for *Middlesex* in a writ of *capias*,) does not vitiate the writ, so as to entitle the defendant to set it aside, and to a discharge from custody. *Colston v. Berens*, 253

CENTRAL CRIMINAL COURT.

The Court of *King's Bench* will, under special circumstances, remove an indictment for a misdemeanour from the *Central Criminal Court*. *Rex v. Caldecott*, 315

CERTIORARI.

See CENTRAL CRIMINAL COURT—INFERIOR JURISDICTION, 1, 2.

1. If a plaintiff without improper motives has removed a judgment into a superior Court by an irregular writ of *certiorari*, issued without leave of the Court, such amendments will be allowed, and terms imposed, as will enable him to avail himself of the judgment, without prejudice to the defendant. *Rowell v. Breedon*, 324

2. The Court will not quash a writ of *certiorari*, unless there is an admission, or something tantamount to it, by the party suing it out, that he has done so for the purpose of delay. *Landens v. Sheil*, 90

CHAMBERS (APPLICATION AT).

See INTERPLEADER, 7.

CHAPLAIN (KING'S).

See PRIVILEGE FROM ARREST, 2.

CHARGING IN EXECUTION.

See FOREIGN JUDGMENT.

Where a defendant has been taken in execution on a *ca. sa.*, and he afterwards removes himself into the custody of the marshal, the plaintiff is neither obliged to carry in the roll, nor to charge him in execution. *Deemer v. Brooker*, 576

CHECK.

See PLEA, 3.

CHURCHWARDEN.

See MANDAMUS, 2.

CLERGYMAN.

See OUTLAWRY, 3.

COGNOVIT.

See PRISONER, 1.

1. The Court refused to grant a rule for setting aside a *cognovit* at the instance of the defendant, because it was not stamped. *Clarke v. Jones*, 277

2. No notice to tax is necessary when a defendant appears in person and gives a *cognovit*, which is good, though there is no declaration. *Ib.*

3. Under a *cognovit*, by which it is agreed, that no judgment is to be signed, or execution issued, unless default made in payment of a certain sum, with costs, by instalments, the plaintiff may sign judgment and issue execution for the whole sum, if default is made in one instalment. *Rose v. Tomblinson*, 49

4. A *cognovit* containing terms of agreement must be stamped; but it is sufficient, to support an execution

under it, if it is stamped by the time cause is shewn against a rule for setting aside the execution, on the ground of its not having been stamped. *Rose v. Tomblinson*, 49

COLLUSION.

See ATTACHMENT AGAINST THE SHERIFF—ATTACHMENT, 3.

COMMISSION TO EXAMINE WITNESSES.

See FOREIGN WITNESS, 2.

COMMISSIONER.

See AFFIDAVIT (ENTITLING), 2.

COMPOSITION.

See AMENDMENT, 1—PLEA, 20.

COMPOUNDING PENAL ACTION.

Leave of the Court for compounding a penal action, where the Crown is entitled to a portion of the penalty, cannot be obtained without the consent of the Attorney-General. *Res v. Gibbs*, 345

CONCLUSION,

See PLEA, 19.

CONDITION.

See AMENDMENT, 4.

CONDITION (BREACH OF).

See MERITS, 4.

CONDUCT MONEY.

See SUBPENA, 4—WITNESS.

CONFESSION AND AVOIDANCE.

See PLEA, 24.

CONSIDERATION.

See PLEA, 3, 4, 11, 16, 20, 21, 22—
REFLEADER—REPLICATION, 4, 5.

CONSOLIDATING ACTIONS.

Where six actions of trover had been brought against the same defendant by different plaintiffs employing the same attorney, the Court refused to order the proceedings in five of them to be stayed to abide the result of one, it being sworn that the causes of action were different in all of them. *Nicholls v. Lefevre*, 185

CONTEMPT.

See ATTORNEY, 3, 12.

CONTEMPT OF PROCESS.

Mere violent snatching an original writ of summons from the person serving a copy of it is not a contempt of the process of the Court. *Weekes v. Whitely*, 536

CONTINGENCY.

See INSOLVENT, 2.

COSTS.

See ARREST (WITHOUT PROBABLE CAUSE), 1, 2, 3—ATTACHMENT, 2—ATTORNEY'S CERTIFICATE—ATTORNEY AND CLIENT, 3, 4—AWARD, 4—BAIL, 1, 5, 6, 12, 13, 14, 15—BAIL-BOND, 1—COUNTY COURT, 1, 2—COURT OF REQUESTS, 1, 2—DEMURRER-BOOKS, 1, 2—EXECUTOR, 1, 2, 3, 4, 5—INQUIRY (WRIT OF)—JUDGES' CERTIFICATE—MASTER'S DISCRETION, 1—MERITS, 5—NEGLIGENCE—PAYMENT INTO COURT, 1—POLICE OFFICER—SECURITY FOR COSTS—SET-OFF—SITTINGS, 1—SLANDER—STAYING PROCEEDINGS, 1, 2—TAXATION—UNNECESSARY PROCEEDINGS.

1. An action for a nuisance (to which a plea of the general issue only was pleaded, before the new rules of pleading,) was referred to an arbitrator, who found that the plaintiff had not proved that the defendant

was the cause of the injury, and he ordered a nonsuit to be entered, but he also ordered that the *defendant* should remove the nuisance within a month:—*Held*, that this was a finding substantially in favour of the defendant, and that he was entitled to the expense of all witnesses who could be material under the general issue. *Radcliffe v. Hall*, 802

2. The Master, in taxing the expenses of witnesses, according to a certain scale, cannot allow more than is actually paid for their travelling expenses. *Id.*

3. In an action of trespass for injury to a wall, the defendant justified under the Building Act, and the plaintiff was nonsuited. The Master thereupon taxed to the defendant treble costs under the 100th section of that act. A motion was made to review the Master's taxation on the ground that the defendant ought to have obtained leave to enter a suggestion under the act, which only gave the defendant costs upon a judgment for costs. The Court discharged the rule. *Wells v. Ody*, 799

4. A clause in a local act, which appointed commissioners for certain purposes, prohibited them under a penalty from acting or voting where they were personally interested. One of the commissioners being sued for the penalty, the plaintiff was nonsuited:—*Held*, that the action could not be said to be brought for "an act or thing done under the act," so as to entitle the defendant to treble costs under another clause of the act. *Charlesworth v. Rudgard*, 517

COSTS (IN THE CAUSE).

Where a rule *nisi* is obtained to reduce the plaintiff's damages, or set the verdict aside, the plaintiff is not entitled to the costs of opposing the rule as costs in the cause, although he succeeds upon one of the alterna-

COSTS (IN THE CAUSE).

times offered by the rule, unless he gives notice to the opposite party of his intention to abandon the other.
M'Andrew v. Adams, 120

COSTS (OF FORMER TRIAL).

If a Judge, of his own authority, discharges a jury from giving a verdict, on the ground of their not being able to agree, the party ultimately successful will not be entitled to the costs of the first attempt at trial.
Seely v. Powers, 372

COSTS (OF THE DAY).

1. The motion for costs for not proceeding to trial is for a rule to be absolute in four days, unless cause is shewn in the meantime. *Robinson v. Robinson*, 177

2. Where a cause, standing in the paper is postponed at the instance of the plaintiff, on payment of costs by him, the defendant is entitled to no more costs than he would have been entitled to, if the record had been withdrawn. *Walker v. Lane*, 504

COUNSEL.

See JURYMAN—WRIT OF TRIAL, 4.

COUNSEL'S SIGNATURE.

See PLEA, 17—SERJEANT.

Where the Vice-Chancellor directed the opinion of the Court to be taken on a special case, the Court would not permit it to be entered for argument with the signature of a Master in Chancery, who had settled it, instead of the signature of counsel; but this Court will not compel an attorney to lay the case before counsel for the purpose of signature. *Roy v. Champneys*, 105

COUNTY COURT.

See SHERIFF, 9.

1. In an action to recover a sum of 8*l.* 2*s.* (as claimed by the particulars of demand), the defendant paid

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1*l.* 18*s.* into Court under rule 19 of *H. T.* 4 *Will.* 4, which the plaintiff took out in full satisfaction of the action. The cause of action arose, and both parties lived, within the jurisdiction of the County Court of *Cardiganshire*: and by order of a Judge the defendant was allowed to enter a suggestion on the roll of these facts, and that the action was brought for a sum under 40*s.*, and further proceedings were stayed, with the view of depriving the plaintiff of his costs; but the Court set aside the order, on account of the form of the rule for paying money into Court, the lateness of the application, and its not clearly appearing that the action was brought for less than 40*s.* *Farrent v. Morgan*, 792

2. The fact of the plaintiff's cause of action not exceeding 40*s.* and the defendant being resident within the county of *Middlesex*, and liable to be summoned to the County Court, cannot be pleaded. *Sandall v. Bennett*, 294

COURT OF REQUESTS.

1. The defendant is entitled to have a suggestion entered under the *London* Court of Requests Act, though the cause was tried before the sheriff by the defendant's consent, and though the motion for that purpose was not made till after the costs had been taxed, final judgment signed and execution issued: and an affidavit which states that the defendant is a silk broker, and has a warehouse and a counting-house in *London*, and that he constantly lived and resided there at the time the cause of action accrued, and till the commencement of the suit, sufficiently shews that he sought a livelihood in *London* at the time of the commencement of the action within the meaning of the act. *Bond v. Bailey*, 808

2. An action for the use and occu-

pation of "furnished" lodgings is within section 13 of the 39 & 40 Geo. 3, c. 104, (the *London Court of Requests Act*), and therefore it may be brought in the superior Courts without the plaintiff's incurring the penalties provided in section 12. *Kidd v. Mason*, 96

3. Previous to making an application with respect to costs, under the *London Court of Requests Act*, it is not necessary to have the record in Court. *Kidd v. Mason*, 85

COURT ROLLS (INSPECTION OF).

If an application to inspect the Court rolls of a manor is made when no cause is pending, the rule is *nisi* in the first instance. *Ex parte Best*, 38

CREDIT.

See PLEA, 15.

CREDITOR.

See DEBTOR.

CROSS-EXAMINATION.

See JUDGMENT BY DEFAULT—SEVERAL DEFENDANTS.

DAMAGES.

See INTEREST—PAYMENT INTO COURT, 3—TENDER.

DEBET.

See EXECUTOR, 6.

DEBTOR.

If a party obtains the benefit of a trust deed executed by his creditors, and in it is contained a consideration that he shall make a full disclosure of his property, but he conceals a portion of it, the creditors signing the deed may still proceed against him. *Wenham v. Fowle*, 43

DECLARATION.

See PLEADING—SERVICE OF NOTICE OF DECLARATION—VENUE, 4, 8.

DECLARING (DE BENE ESSE).

1. The year within which a plaintiff must, according to the rule of law, deliver his declaration, is, in real as well as personal actions, to be reckoned from the return day of the writ, and not from the date of the defendant's appearance. *Barnes v. Jackson*, 404

2. A declaration in the commencement stated, that the defendant was summoned to answer the plaintiff assignee of certain sheriffs; but the bond declared on appeared to be made to the plaintiff personally:—*Held*, sufficient on special demurrer. *Reynolds v. Welsh*, 441

3. In an action of debt on an annuity deed, it appeared that the covenant was with the plaintiff and another to pay to them one annuity of 30*l.*, a moiety of which was to be paid to the plaintiff, and the other to the other covenantee; by another part of the deed it appeared, that the annuity was to be secured by a joint judgment, &c. The plaintiff having obtained a verdict for arrears of the annuity due to himself, the Court arrested the judgment, on the ground that the other covenantee ought to have joined in the action. *Lane v. Drinkwater*, 223

DECLARING (AGAINST SEVERAL).

Upon a writ against several, the plaintiff may declare against one only; but if he declares against any other defendant afterwards, he will be irregular. *Coldwell v. Blake*, 656

DECLARING (DE BENE ESSE).

See ATTACHMENT AGAINST THE SHERIFF—BAIL-BOND, 4.

Where a defendant puts in bail, but does not justify, a declaration *de bene esse* is properly *filed*, and not delivered. *Rex v. The Sheriff of Middlesex*, 186

DECLARING (TIME FOR).

If a plaintiff's proceedings on a writ of summons are stayed by rule, he is bound to declare within a year after the expiration of that rule, or he will be out of Court. *Unite v. Humphrey*, 532

DEED.

See DEBTOR.

The effect of an instrument under seal cannot be altered by a memorandum not under seal. *Wenham v. Fowle*, 43

DEFENDANT (DESCRIPTION OF).

See AFFIDAVIT (ENTITLING), 4.

DELAY.

See CERTIORARI, 2—PLEADING (TIME FOR), 1—TERM'S NOTICE.

DELIVERY.

See REPLICATION, 6.

DEMURRER.

See ATTORNEY, 2—DECLARATION, 2—EXECUTOR, 6—PLEA (STRIKING OUT)—PLEA, 1, 2, 11, 14, 15, 16, 18, 19, 21—REPLICATION, 2, 7—VENUE, 4.

1. A statement in the margin of a demurrer to a plea that the matters disclosed in the plea contain no answer to the declaration:—*Held*, insufficient, within the meaning of 2 *H. T.*, *R. G.* 4 *Will.* 4. *Ross v. Robeson*, 779

2. Proposed rule as to demurrers not intended for argument. *Harvey v. King*, 730

3. It is not a sufficient objection to a demurrer being argued, that the point intended to be raised is not stated in the margin of the demurrer. The rule only enables the opposite party to set aside the demurrer. *Lacey v. Umbers*, 732

4. If the ground of demurrer stated pursuant to 2 *Reg. Gen. H. T.* 4 *Will.* 4, (Practice Rules), in the margin appears sufficient, the Court will not

set the demurrer aside as frivolous. *Tyndall v. Ulleshorne*, 2

5. A demurrer to a plea to an information on the revenue side of the Court of *Exchequer*, does not require a matter of law to be stated in the margin, according to rule 2 of *H. T.* 4 *Will.* 4, but it must be signed by the Attorney-General before it is delivered. *The King v. Woollett*, 694

DEMURRER (FRIVOLOUS).

See DEMURRER, 3, 4.

1. Where a defendant pleaded a frivolous demurrer so late in the term that there was not sufficient time to set it down for argument, and a motion was made to set it aside, the Court would only let the defendant in to plead on an affidavit of merits, pleading *instantly*, and paying the costs of the demurrer and the application. *Underhill v. Hurney*, 495

2. A rule *nisi* for setting aside a demurrer as being frivolous, should be drawn up on reading the pleadings. *Howorth v. Hubbersty*, 455

3. Where a demurrer is frivolous, and a motion is made to set it aside, the Court will grant "a rule for that purpose to be absolute, unless cause is shewn on a particular day." *Kinnear v. Keane*, 154

4. A defendant, after having had time to plead, demurred to the declaration, which was in debt on a bill of exchange with the common counts, in this form: "The defendant by his attorney says, that the declaration is not sufficient in law; and also that an action of debt will not lie, and that the bill should have been stated to be for value received."—*Held*, that the plaintiff was not justified in signing judgment as upon a sham demurrer. *Lyons v. Cohen*, 243

DEMURRER BOOKS.

See SCIRE FACIAS, 5.

1. If a party seeks to make his
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opponent pay the costs of copies of demurrer books, pursuant to 7 *R. G. H. T. 4 Will. 4*, he must deliver them on the day after the time for his opponent's delivering them expires. *Fisher v. Snow*, 27

2. A cause was entered in the paper for argument. A defendant having demurred to a replication, the plaintiff got the case put into the paper as for argument, and the defendant came prepared to argue the point; but it appeared that the plaintiff had not joined in demurrer, and of course no proper books were delivered to the Judges:—*Held*, that the defendant was not entitled to his costs of appearing for argument. *Howorth v. Hubbersty*, 457

3. If one side neglects to deliver his demurrer books to the Judge, the other side should do so for him, and then he will be entitled to judgment; but otherwise the case will be struck out. *Abraham v. Cook*, 215

DEPARTURE.

See PLEA, 1—REPLICATION, 3.

DEPONENT (DESCRIPTION OF).

See AFFIDAVIT, 6—AFFIDAVIT OF DEBT, 5.

DEPOSIT IN LIEU OF BAIL.

1. If a defendant deposits money in the hands of the sheriff, pursuant to the 43 *Geo. 3*, c. 46, s. 2, which is paid into Court, the defendant will not be allowed to take it out, unless he has put in bail according to the exigency of the *capias*, although such a deposit is not mentioned in the warning attached to that writ.

If, however, bail has been perfected, but not in due time, before the plaintiff takes the money out, he must make his election as to which security he will take. *Geach v. Coppin*, 74

DISTRINGAS.

2. If a defendant has deposited money in lieu of bail, which the sheriff pays into Court, he is entitled to take it out on justifying bail in due time. *Young v. Malby*, 604

3. If the affidavit on which such a motion is made states bail to have been justified, the Court will presume that it has been justified in due time, unless the contrary be shewn by the plaintiff. *Ib.*

4. If, instead of putting in bail, a defendant deposits the amount of the debt, with 10*l.* for costs, pursuant to the 43 *Geo. 3*, c. 46, s. 2, he is not bound to pay in the additional 10*l.*, pursuant to the 7 & 8 *Geo. 4*, c. 71, s. 2, until the last day allowed for perfecting special bail. *Straford v. Love*, 593

DESCRIPTION.

See AFFIDAVIT, 6—BAIL, 9.

DETINET.

See EXECUTOR, 6.

DETINUE.

See EXECUTOR, 6—STAYING PROCEEDINGS, 4.

DISCHARGE.

See PRISONER, 2.

DISCONTINUANCE.

See ARREST (SECOND)—ATTORNEY AND CLIENT, 1—BAIL-BOND, 3—SEVERAL WRITS FOR THE SAME CAUSE OF ACTION, 1, 2—STAYING PROCEEDINGS, 2.

The plaintiff cannot discontinue after a verdict for the defendant with leave to the plaintiff to enter a verdict for himself. *Goodenough v. Butler*, 751

DISCRETION OF COURT.

See INFORMER (COMMON).

DISTRINGAS.

1. A *distringas* was granted against

a defendant, though he had not been served with a writ, it appearing that he had gone abroad to avoid his creditors, and had left servants at his house in town. *Moon v. Thynne*, 153

2. The sheriff's return to a *distringas* of *non est inventus* and *nulla bona*, is not alone sufficient to entitle the plaintiff to enter an appearance for the defendant; and the Court cannot listen to hearsay evidence of the efforts made to execute the writ. *Daniels v. Varity*, 26

3. A *distringas* will not be granted on an affidavit merely stating the defendant to be absent in *Ireland*, without shewing that he has gone there to avoid his creditors, although he may have a residence in town, at which unsuccessful attempts to serve him have been made. *Evans v. Fry*, 581

DOCUMENTS (ADMISSION OF).

1. The Court has not jurisdiction under r. 20 of *H. T.*, 4 *Will.* 4, to order the admission of documents; but if a Judge at chambers desires parties coming before him under that rule to go before the Court, they will be heard, but the Court will pronounce no judgment, leaving that to be done by the Judge at chambers.

On the plaintiff paying the defendant the expenses of examining a judgment and other documents abroad, an order was made for the defendant to pay the expense of proving them at the trial (such proof being satisfactory to the Judge, and so certified by him), whatever might be the result of the case, if after such examination the defendant did not admit them. *Smith v. Bird*, 641

2. In an action for running down a ship, tried at *Newcastle-upon-Tyne*, the plaintiff having obtained a verdict, the Master refused to allow him the expense of proving certain documents, being the registers and transfers, &c.

of the ship; upon the ground that reasonable notice had not been given to the defendant, to allow copies to be given in evidence. The commission day was on the 4th *March*; notice of trial had been given on the 21st *February*, and the notice to admit the documents was not served till *Saturday*, the 28th of *February*, on the *London* agent. He, however, refused to admit the copies, and another application was made on the following *Monday* and the copies were produced to him, but he again refused, and a summons was then taken out, returnable the next day, but not attended. On the previous evening, the agent sent off the briefs. The Court ordered the Master to review his taxation. *Tynn v. Billingsley*, 810

DRAWER.

See PLEA, 2, 11, 22—REFLEADER, 3—REPLICATION, 7—STAYING PROCEEDINGS, 2.

DUPLICITY.

See PLEA, 11, 19—REPLICATION, 2, 6.

EASTER TUESDAY.

See NOTICE OF TRIAL.

EJECTMENT.

See JUDGMENT AS IN CASE OF A NON-SUIT, 2—LANDLORD AND TENANT—SETTING ASIDE PROCEEDINGS.

1. Where part of the property for which an ejectment was brought consisted of three unfinished houses, which were untenanted, and there was no property in them, the Court refused to allow the service of the declaration by sticking it up on the outer door, but obliged the lessor of the plaintiff to proceed as upon a vacant possession. *Doe d. Schovell v. Roe*, 691

2. Service of a declaration in

ejectment upon the sister of the tenant in possession, who says that she receives it on behalf of her sister, will not be good unless agency be shewn. *Doe d. Tibbs v. Roe*, 380

3. The Court will not allow a wife's declarations with respect to her husband being out of the way, to avoid being arrested or annoyed, to be used for the purpose of obtaining judgment against the casual ejector. *Doe d. Wilson v. Smith*, 379

4. A notice at the foot of a declaration in ejectment, omitting to state that the consequence of the action not being defended will be turning the tenant out of possession, is defective, but may be amended on terms. *Doe d. Darwent v. Roe*, 336

5. Where it became necessary to employ an interpreter, in order to explain to the tenant the object of the declaration in ejectment, but who was not upon oath:—*Held*, that the explanation was sufficient to entitle the lessor of the plaintiff to sign judgment. *Doe d. Probert v. Roe*, 335

6. The venue in the margin in the declaration in ejectment is immaterial, if the venue in the body of the declaration is correct. *Doe d. Goodwin v. Roe*, 323

7. Special service in ejectment. *Doe d. Frost v. Roe*, 314

8. Judgment against the casual ejector may, under special circumstances, be obtained on an affidavit swearing the service to have been on the tenant in possession, "as the deponent believes." *Doe d. George v. Roe*, 22

9. Where the tenant in possession has absconded to another country, the service of the declaration in ejectment may be effected on his agents on the premises. *Doe d. Robinson v. Roe*, 11

10. Service on the daughter on the premises is insufficient, even for a rule nisi, although there may be

reason to believe the wife is aware of the proceeding, and keeps out of the way to avoid being served. *Doe d. George v. Roe*, 9

11. The statement of a term not yet arrived, in intitling a declaration in ejectment, is immaterial, if sufficient information as to the time of appearance is given in the notice. *Doe d. Gore v. Roe*, 5

12. Special service of declaration in ejectment. *Doe d. Wills v. Roe*, 582

13. Where a tenant in possession keeps out of the way to avoid being served, a rule nisi for judgment may be obtained by a service on the agent of the tenant on the premises. *Doe d. Morpeth v. Roe*, 577

14. If a tenant in possession is clearly keeping out of the way to avoid being served, the Court will grant a rule nisi for judgment, if the son is regularly served on the premises. *Doe d. Luff v. Roe*, 575

15. If a regular service is effected before the term in which the appearance is to be made and which elapses, a motion for judgment may be made in the following term on the same service. *Doe d. Thomson v. Roe*, 575

16. If the tenant in possession by fraud prevents a complete and regular service of the declaration in ejectment, judgment may still be obtained against the casual ejector. *Doe d. Frith v. Roe*, 569

17. Special service in ejectment. *Doe d. Frost v. Roe*, 563

18. If the wife on the premises has received the declaration, and prevents the person serving it from giving an explanation, or reading it over, the service is sufficient. *Doe d. George v. Roe*, 541

ENROLLING ATTORNEY'S NAME.

See ATTORNEY, 1.

ERASURE.

See AFFIDAVIT, 4.

ERROR.

1. After a verdict for the plaintiff in an action for slander, the defendant obtained a rule *nisi* for arresting the judgment on two grounds, but the Court afterwards discharged the rule without hearing the counsel against it. The defendant then brought a writ of error suggesting the same grounds:—*Held*, that these grounds could not be considered as frivolous within the meaning of 9 R. G. H. T. 4 Will. 4. *Gardner v. Williams*, 796

2. If an infant assigns, by attorney, for error *coram nobis*, that he has improperly appeared in the action by attorney instead of guardian, it is not a mere irregularity, but a ground of error: still the Court will, on application, set the assignment aside, and allow the plaintiff in error to assign by guardian. *Beven v. Cheshire*, 70

ESTREAT.

A motion to discharge a defendant from estreated recognizances, under the 4 Geo. 3, c. 10, must be preceded by a notice to the solicitor of the Treasury. *Re Tipton*, 177

EVIDENCE.

See GENERAL ISSUE.

EXCHEQUER OFFICE.

The afternoon in the *Exchequer*, for the purpose of signing judgment, does not commence in term till three o'clock. *Tate v. Bodfield*, 218

EXCHEQUER PRACTICE.

See BAIL-BOND, 6—DEMURRER, 5—NOTICE OF MOTION—WELSH JURISDICTION.

EXECUTION.

See AMENDMENT, 2—CHARGING IN

EXECUTION — SEQUESTRATION — SETTING ASIDE PROCEEDINGS, 8—SHERIFF, 4, 9—TESTE OF WRIT, 2—VARIANCE.

The 3 & 4 Will. 4, c. 67, s. 2, as to making writs of execution returnable immediately, applies to executions issued on judgments obtained both before and since it passed. *Rez v. The Sheriff of Surrey*, 82

EXECUTOR.

See AFFIDAVIT (ENTITLING), 5—ATTACHMENT, 1—JUDGMENT (RECOVERED)—PLEA, 18.

1. An executor plaintiff who loses his cause is not, under the 3 & 4 Will. 4, c. 42, s. 31, exempted from the payment of costs unless *mala fides* appears on the part of the defendant—*Vaughan, J., dissentiente. Brown v. Croley*, 386

2. The 3 & 4 Will. 4, c. 42, s. 31, applies to those cases only where an executor before the act was not liable to costs. *Ashton v. Poynter*, 465

3. An executor plaintiff on a verdict against him, who applies to be relieved from costs under that act on special grounds, ought to do so in the first instance, for the Master is correct in taxing costs to the defendant in the usual way; and, therefore, where there were several counts in a declaration by executors, some on promises to the testator, and some on promises to the executors, and the defendant having got a verdict, the Master taxed to him the whole costs of the cause, and the plaintiff then applied to have the Master's taxation reviewed, the Court would only do so on the terms of his paying the costs of the motion, though the defendant gave up the costs of those counts in which the promises were laid to the testator. 1*b*.

4. An executor plaintiff will be made to pay costs on the failure of his suit, if it appear that he commenced

the action without ascertaining that he had a probability of proving his case. *Wilkinson v. Edwards*, 137

5. Where a motion is made against an executor to compel him to account, and the rule is made absolute, it is not imperative upon the Court to make the rule absolute with costs. *Ex parte Siratt*, 209

6. A demurrer to a declaration by executors, commencing in the *debet* and *detinet*, was overruled. *Collett v. Collett*, 211

FEME COVERT.

See AMENDMENT, 6—REPLICATION, 3.

FOREIGNER.

See AFFIDAVIT, 6.

FOREIGN ARREST.

See OUTLAWRY, 2.

FOREIGN DOCUMENT (PROOF OF).

See DOCUMENTS (ADMISSION OF), 1.

FOREIGN JUDGMENT.

Where an action was brought in this country on a foreign judgment, and the plaintiff obtained a verdict and judgment, this Court refused to prevent the plaintiff charging the defendant in execution upon the latter judgment, though it was sworn that an appeal was still pending in the foreign Court upon the original judgment, it not appearing that the appeal had been proceeded with. *Alison v. Furnival*, 202

FOREIGN WITNESS.

See INTERROGATORIES, 1, 2.

1. A *mandamus* cannot be issued into *Scotland* under the 1 *Will.* 4, c. 22, s. 1, for the examination of witnesses there; but a commission may be issued for that purpose under the 4th section. *Wainright v. Bland*, 653

HUSBAND AND WIFE.

2. On an application by the defendant for a commission to examine witnesses abroad, the Court refused to make it a part of the rule to call upon the plaintiff to produce a bill of exchange in his possession at the time of executing the commission. *Cunliffe v. Whitehead*, 634

3. By the 1 *Will.* 4, c. 22, the Court has power to issue a *mandamus* to examine a witness in *India*, where-soever the cause of action may have arisen. *Bain v. De Vetry*, 516

FRAUD.

See ATTORNEY AND CLIENT, 2—DEBTOR—EJECTMENT, 16, 18—PLEA, 22—REPLICATION, 5.

GENERAL ISSUE.

See PLEA, 8, 10, 24—PLEA (FRIVOLOUS)—PLEA (STRIKING OUT).

Evidence of a special contract may be given under the general issue to a declaration in the common form for goods bargained and sold. *Gardner v. Alexander*, 146

GUARANTY.

See PLEA, 15.

GUARDIAN.

See ERROR, 2.

GRATIS (REJOINDER).

See NON PROS.

HABEAS CORPUS.

See LUNATIC—REMOVAL OF CAUSE—RENDER OF PRINCIPAL.

It is no objection to a *habeas corpus* that the attorney suing it out was not on the roll. *Glynn v. Hutchinson*, 529

HEARSAY.

See DISTINGUAS, 2.

HOLIDAY.

See NOTICE (OF TRIAL).

HUSBAND AND WIFE.

See AFFIDAVIT OF DEBT.—EJECTMENT, 3, 10, 18—REPLICATION, 3.

ILLEGALITY.

ILLEGALITY.

See PLEA, 7, 9.

ILLITERATE DEPONENT.

If an illiterate person is sworn in Court, or before a commissioner, the fact of the affidavit being read over to him, and his understanding it, must be stated in the jurat. *Haynes v. Powell*, 599

IMPARLANCES.

1. The 2 & 3 Will. 4, c. 39, s. 11, abolished imparlances. *Wigley v. Tomlins*, 7

2. Since the Uniformity of Process Act, a defendant is not in any case entitled to an imparlance. *Nurse v. Geeting*, 157

INCONSISTENT PLEAS.

See PLEAS (INCONSISTENT).

INCUMBENT.

See MANDAMUS, 1, 4.

INDIA.

See FOREIGN WITNESS, 3.

INDORSEE.

See PLEA, 2, 14, 16, 21, 22, 23—
REJOINDER—REPLICATION, 3, 4, 5.

INDORSEMENT ON PROCESS.

See CAPIAS, 3—OUTLAWRY, 3—RESIDENCE (OF ATTORNEY), 1—RESIDENCE (OF DEFENDANT), 1.

1. A Judge at chambers cannot amend the indorsement of a writ of summons by reducing the amount of the claim indorsed upon it, in order to try the cause before the sheriff. *Trotter v. Bass*, 407

2. A writ indorsed *M. & Co.*, agents for *S.*, without specifying the christian names:—*Held*, sufficient. *Pickman v. Collis*, 429

3. The Court refused to set aside

INDORSEMENT.

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the copy of a writ, because the word "plaintiff" was used in the indorsement on the back of the writ instead of the plaintiff's name. *Hannah v. Wyman*, 673

4. The indorsement on a writ that the plaintiff claims a sum for debt, with interest thereon, from a certain day, is sufficiently certain. *Coppelo v. Brown*, 166

5. In the indorsement, pursuant to 2 Reg. Gen. H. T. 2 W. 4, the word "service" and not "execution" must be used, although the defendant has been arrested. *Colls v. Morpeth*, 23

6. In an action on a bail-bond, it is unnecessary to make the indorsement of debt and costs claimed pursuant to 2 Reg. Gen. H. 2 Will. 4, and 5 Reg. Gen. M. 3 Will. 4. *Smart v. Lovick*, 34

7. An irregularity in the indorsements on writs required by the rules of Court is no ground for setting aside the writ itself or for cancelling the bail-bond, if the plaintiff, upon notice of the objection, amends the defect, on payment of costs; but the defendant is to be allowed four days' further time after the amendment to pay the debt. *Cooper v. Waller. Tabram v. Thomas*, 167

8. A writ indorsed in this form—"The plaintiff claims 50*l.* for debt with interest from the 25th of May last, and 2*l.* for costs:"—*Held*, regular. *Sealy v. Hearne*, 196

9. In the indorsement pursuant to 2 Reg. Gen. H. 2 Will. 4, if "execution" is substituted for "service," it is an irregularity, but which may be amended on terms. *Urquhart v. Dick*, 17

10. If an affidavit, made in support of an application to set aside a Judge's order, state the substance of that order, it is sufficient. *Shirley v. Jacobs*, 101

11. An indorsement on a writ of *capias*, which does not strictly follow

846 INDORSEMENT.

the form given in 2 *Reg. Gen. H. T.*
2 *Will.* 4, must at least be amended.
Shirley v. Jacobs, 101

INDORSER.

See PLEA, 16, 23—REPLICATION, 3,
4, 5.

INDUCEMENT.

See PLEA, 12.

INFAMY.

See BAIL, 8.

INFANT.

See ERROR, 2.

The Court will not discharge an infant defendant in an action of slander, from execution for damages and costs, although the Insolvent Court has refused to relieve him, because, on account of his infancy, he was unable to make the assignment of property required by the 7 *Geo.* 4, c. 57.
Defries v. Davies, 629

INFERIOR JURISDICTION.

1. Where a judgment has been obtained in the Court of *Common Pleas* of the county palatine of *Lancaster*, it is necessary, in order to issue execution out of a superior Court, that it should appear that the defendant has removed himself and effects out of the jurisdiction. *Lord v. Cross*, 4

2. A rule for a *certiorari* to remove a record from an inferior jurisdiction is absolute in the first instance.
Pamsey v. Gooday, 605

INFORMER (COMMON).

A party suing for penalties for the violation of an act of Parliament will not have the *discretion* of the Court exercised in his favour, if the action be merely within the letter of the act, and not its spirit. *Ex parte Swift*, 636

INTERPLEADER.

INJUNCTION.

See PAYMENT INTO COURT, 4.

INQUIRY (WRIT OF).

After judgment by default, and writ of inquiry executed, the Court upon application ordered a new inquiry, on the ground that, as to part of the damages found, there was no evidence to warrant the finding of the jury; the defendant, however, in order to save the expense of a second inquiry, paid the plaintiff the whole of his demand:—*Held*, notwithstanding, that he was not bound to pay the plaintiff the costs of the inquiry. *Porter v. Cooper*, 662

INSOLVENT.

See INFANT—OUTLAWRY, 2, 7—SEQUESTRATION, 1.

1. Sec. 57 of the 7 *Geo.* 4, c. 57, (the Insolvent Act), which authorises execution in certain cases against an insolvent who has obtained his discharge, does not apply to a *ca. sa.*
Rivett v. Lark, 62

2. If a claim against an insolvent at the time of making his schedule depends upon a contingency, it is not barred by the act. *Lawrence v. Walker*, 614

INTEREST.

See AFFIDAVIT OF DEBT, 7, 10, 11—INDORSEMENT ON PROCESS, 4, 8.

Interest paid by a purchaser upon money borrowed by him to complete the purchase, and kept idle, (pending an endeavour by the vendor to clear up the title), may be recovered as damages against the latter in an action for breach of his contract. *Sherry v. Oke*, 349

INTERLINEATION.

See AFFIDAVIT, 4.

INTERPLEADER.

1. Where, in consequence of a

claim made to goods seized by a sheriff in execution, the Court ordered the claimant to proceed to trial upon paying a sum of money into Court, which he neglected to do, and a rule was then obtained to compel him to pay the costs occasioned by his false claim:—*Held*, that he was liable to pay those costs as well as the costs of that rule, though no previous application had been made to him. *Scales v. Sargeson*, 707

2. If a sheriff who has seized goods under a *fi. fa.* receives notice of an intended *fiat* of bankruptcy against the defendant, he will be entitled to relief under the Interpleader Act, if he comes to the Court on the second day of the term after the assignees are appointed. *Barker v. Phipson*, 590

3. Where the sheriff applied for relief under the Interpleader Act, but it appeared that an attachment had been already obtained against him for not returning the writ, the Court would only make the rule absolute on the terms of his paying for moving for the attachment. *Alemore v. Adeane*. *Hope v. Same*, 498

4. This Court will not allow the sheriff applying to be relieved under the Interpleader Act from his costs, where the claimant does not appear. Nor will the plaintiff be allowed his costs, except in the event of extremely improper conduct in the parties. *Oram v. Sheldon*, 640

5. Where a sheriff applied for relief under the Interpleader Act, and it appeared that he had been guilty of neglect, the Court refused to relieve him from any liability occasioned thereby. *Blackenbury v. Laurie*, 180

6. A rule under the 1st section of the Interpleader Act cannot be drawn up for a stay of proceedings unless notice has been given. *Smith v. Wheeler*, 431

7. Such a rule may be drawn up to shew cause at chambers. *Id.*

8. The Court will allow the sheriff who applies for relief under the Interpleader Act, such expenses as he may incur as agent of the parties after his application. *Dabbs v. Humphries*, 377

9. Where an issue is directed to be tried between an execution creditor and a claimant, brought before the Court by the sheriff, under the Interpleader Act, but the latter refuses to try, and abandons his claim, he will be liable to pay the execution creditor's costs down to the time of the claim being abandoned, and of applying to take the money paid in by the sheriff, out of Court. *Wills v. Hopkins*. *Bragg v. The Same*, 846

10. If an execution creditor abandons his process against certain goods seized under a *fi. fa.*, in favour of a claimant, the sheriff has still a right to shew in an action against him, that the goods were the property of the defendant. *Baynton v. Harvey*, 844

11. Under the 1 & 2 Will. 4, c. 58, s. 6, (the Interpleader Act,) the sheriff need not wait for proceedings to be taken against him before he applies to the Court for relief. *Green v. Brown*, 337

12. Where the sheriff has been allowed to withdraw from possession by authority of a rule under the Interpleader Act, he cannot afterwards, and after he is out of office, be compelled to re-enter. *Wilton v. Chambers*, 12

13. Where the sheriff is placed in circumstances which give him an interest on either side, the Court will not relieve him under the Interpleader Act. *Duddin v. Long*, 139

14. Where an auctioneer has one action brought against him in *Common Pleas*, and another in *King's Bench*, by different claimants for the same property, he must, to relieve himself under the Interpleader Act, obtain rules in both Courts. *Allen v. Gilby*, 143

15. If a part of a sum claimed by the parties has been paid to one of them before adverse claim made, the adverse claimant has a right to have the whole sum he claims paid into Court on the holder applying for relief under the Interpleader Act. *Allen v. Gilby*, 143

16. If a sheriff receives notice on the 23rd of January, of a claim to goods seized by him under a *fi. fa.*, he will not be entitled to relief under the Interpleader Act, unless he comes to the Court in Hilary term. *Ridgway v. Fisher*, 567

INTERPRETER.

See EJECTMENT, 5.

INTERROGATORIES.

1. A rule of Court for the examination of witnesses on interrogatories in a foreign country, is not an absolute stay of proceedings, but only a limited one. *Forbes v. Wells*, 318

2. Where a witness resides abroad at such a great distance that a commission sent out to examine him would necessarily occasion great delay, it is not a matter of course to grant such a commission on the application of the defendant, but it must be made out to the satisfaction of the Court that the evidence of the witness would be admissible, and of service to the defendant when obtained; and therefore, where in an action on a bill by the indorsee against the acceptor, the defendant applied for a commission to examine the drawer in *Upper Canada*, to shew that there was nothing due from the defendant to him, and it was sworn that it was believed that the plaintiff had not given value, but, upon a former hearing before a Judge at chambers, it appeared to him that the plaintiff had given value, the Court refused to interfere. *Lloyd v. Key*, 253

JUDGE'S POWER.

IRREGULARITY.

See JUDGMENT—OUTLAWRY, 3.

The Court will not permit an irregularity to pass uncorrected if brought under its notice, although the opposite party appears by his silence to have waived it. *Symood and Dogherty's Bail*, 116

ISSUE.

See REPLEADER—SIMILITER.

It is no objection to an issue that the form of action is not inserted therein. *Ball v. Hamlet*, 188

JOINDER OF PARTIES.

See DECLARATION, 3.

JUDGE (JURISDICTION OF).

See DOCUMENTS (ADMISSION OF), 1—
LANCASTER (COURT OF C. P. OF), 1.

JUDGE'S CERTIFICATE.

See SLANDER.

Under the directions to taxing officers promulgated in *H. T. 4 Will. 4*, it is not necessary for the Judge who certifies, to enable a plaintiff to obtain full costs, to hear the cause throughout. *Nokes v. Frazer*, 389

JUDGE'S NOTES.

Where two issues were raised by the pleadings, and the jury found upon both, but the Judge, before whom the cause was tried, discharged the jury upon the second issue, upon misapprehension that the verdict upon one issue rendered the other issues immaterial, the Court held, that the proper course was not to move for a new trial, but to apply to the Judge to have the verdict corrected according to his notes. *Iles v. Turner*, 211

JUDGE'S ORDER.

See RETURN OF WRIT, 1, 2.

JUDGE'S POWER.

See SPECIAL JURY.

JUDGMENT.

JUDGMENT.

See NUL TIEL RECORD—SCIRE FACIAS, 15—UNNECESSARY PROCEEDINGS.

An interlocutory judgment, signed without an appearance entered, is a nullity, and cannot be waived. *Roberts v. Spurr*, 551

JUDGMENT (ACTION ON).

It is no answer to an action of debt on a judgment, that the defendant had been taken under a writ of *ca. sa.* issued on the judgment, and detained in custody twenty days, if it appears that the defendant was by a Judge's order let out of custody on certain terms. *M'Cornish v. Melton*, 215

JUDGMENT (AS IN CASE OF A NONSUIT).

1. Where issue was joined on the 24th November, in a country cause, and the plaintiff did not give notice of trial:—*Held*, that judgment as in case of a nonsuit might be moved for after one assize had passed. Unless the *similiter* is added, issue cannot be said to be joined for the purpose of such a motion. *Smith v. Rigby*, 705

2. In ejectment, it is no answer to a rule for judgment as in case of a nonsuit, that the plaintiff's agent had been let into possession by the tenants, it not appearing that it was with the consent of the defendant, who was the landlord. *Doe d. Draper v. Dyer*, 696

3. When a rule *nisi* for judgment as in case of a nonsuit was discharged on a peremptory undertaking to try at the next assizes, and afterwards an order for trial at the sheriff's court was obtained, and the plaintiff neglected to try at the next sheriff's court:—*Held*, that the defendant was entitled to a rule absolute for judgment

JUDGMENT.

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as in case of a nonsuit. *Williams v. Edwards*, 660

4. It is a sufficient excuse in shewing cause against a rule for judgment as in case of a nonsuit for not proceeding to trial pursuant to notice, that the cause was withdrawn, in order to obtain a special jury. *Webber v. Roe*, 589

5. The issue in a country cause, ordered to be tried before the sheriff, was joined on the 9th of August, but the plaintiff did not give notice of trial; a motion for judgment as in case of a nonsuit, in the Hilary term following, was held to be premature. *Harle v. Wilson*, 658

6. Notice of trial was given in a cause (ordered to be tried before the sheriff) for a court day in Easter Term, the issue having been joined in the previous vacation; but the plaintiff did not proceed to trial according to his notice:—*Held*, that a motion for a judgment as in case of a nonsuit, made in the same term, was too early. *Lenney v. Poulter*, 650

7. In an action for a malicious arrest, the Court discharged a rule for judgment as in case of a nonsuit, with costs, where the plaintiff shewed that he only forbore proceeding to trial because the defendant had instituted criminal proceedings against him on the charge for which the arrest was made. *Grey v. Hutchins*, 414

8. Where a plaintiff does not proceed to the trial of an issue before the under-sheriff, pursuant to notice, the time at which he would be compelled to proceed by the Court will be regulated by the times at which the sheriff sits. *Banks v. Wright*, 14

9. It is no ground for discharging a rule for judgment as in case of a nonsuit, on a peremptory undertaking, that the attorney withdrew the record because the plaintiff had promised to supply him with money, and

having failed to do so, the attorney withdrew the record. *Cleasby v. Poole*, 162

10. The issue in this cause was joined two days before *Trinity* term last. It was a country cause, and no notice of trial was given for the assizes; a motion, in *Michaelmas* term, for judgment as in case of a nonsuit, was held to be not too early. *Williams v. Edwards*, 183

11. Where issue was joined in a country cause before the sheriff in *June*, and no notice of trial was given:—*Held*, that a motion for judgment as in case of a nonsuit in *Michaelmas* term was too early, though two Court days had passed. *Butterworth v. Crabtree*, 184

12. Where a trial is ordered to take place in the Sheriff's Court under the Writ of Trial Act, and the plaintiff does not proceed to try according to the course and practice of the Sheriff's Court, the defendant may apply for judgment as in case of a nonsuit. *Maddeley v. Batty*, 205

13. Where issue was joined on the 20th *June*, and notice given for trial at the Sheriff's Court on the 18th *July*, which the plaintiff countermanded:—*Held*, that a motion in the term next following for judgment as in the case of a nonsuit was not too early. *Ib.*

JUDGMENT (FOR WANT OF A PLEA).

See ADMINISTRATOR.

1. A plaintiff has no right to sign judgment for want of a plea, before the time for pleading is out, although a bad plea may have been delivered. *Dakins v. Wagner*, 535

2. If a plea is delivered, but informal in some respects, as in not being signed by counsel, when it ought to be signed, the plaintiff cannot forthwith sign judgment as for

JUDICIAL NOTICE.

want of a plea, but must wait till the time for pleading is out. *Macker v. Billing*, 248

3. Where the declaration was delivered on the 7th to plead in four days, and on the 10th an order for particulars was obtained, which were delivered on the 13th:—*Held*, that judgment for want of a plea, signed at ten o'clock on the 15th, was regular. *Tate v. Bodfield*, 218

4. A declaration was delivered on the 4th of *August* with notice to plead in four days:—*Held*, that judgment could not properly be signed till the afternoon of the 9th for want of a plea. *Kemp v. Fyson*, 265

JUDGMENT (NON OBSTANTE VEREDICTO).

See LANCASTER (COURT OF COMMON PLEAS OF), 3—PLEA, 16.

JUDGMENT (BY DEFAULT).

See REMOVAL OF CAUSE.

In an action for work and labour, the defendant, on a judgment by default, is at liberty to cross-examine the plaintiff's witnesses, who are called to prove the work done, as to whether the work was done on the defendant's retainer or not. *Williams v. Cooper*, 204

JUDGMENT (RECOVERED).

See ADMINISTRATOR.

8 *Reg. Gen. H. T. & Will.* 4, does not apply to judgments in other cases pleaded by an executor. *Power v. Fry*, 140

JUDGMENT (TIME FOR SIGNING).

See EXCHEQUER OFFICE.

JUDICIAL NOTICE.

See ATTORNEY, 12—ATTORNEY'S BILL,

JURAT.

2, 3—BAIL, 11—IRREGULARITY—
UNQUALIFIED PRACTITIONER, 2.

JURAT.

See AFFIDAVIT, 4—ILLITERATE DE-
PONENT.

JURISDICTION.

See MAGISTRATE'S JURISDICTION—
PLEADING.

The General Rules of *H. T. 2*
Will. 4, only apply to actions in
which the Courts who made them
have concurrent jurisdiction. *Barnes*
v. Jackson, 404

JURY.

See COSTS (OF FORMER TRIAL).

JURYMAN.

The Court will not hear counsel
for a juryman who has been fined for
contempt. *Carne v. Nicoll*, 115

JUSTICE'S JURISDICTION.

See MAGISTRATE'S JURISDICTION.

JUSTIFICATION.

See PLEA (ADDING).

Where a plea justified two assaults
(the declaration only charging one)
and no evidence was given of the
second assault mentioned in the plea,
and the jury found a verdict for the
defendant:—*Held*, that as it was un-
necessary to have justified a second
assault in the plea, it was unnecessary
to prove it. *Atkinson v. Warne*, 483

KING'S CHAPLAIN.

See PRIVILEGE FROM ARREST, 2.

LACHES.

See ATTORNEY'S BILL, 2—BAIL, 16—
CAPIAS, 8, 9—COUNTY COURT, 1—
COURT OF REQUESTS, 1—DEMUR-
RER BOOKS, 1—EXECUTOR, 3—DO-
CUMENTS (ADMISSION OF), 2—IN-
TERPLEADER, 3, 5, 16—OUTLAWRY,
3—PRISONER, 1—RESIDENCE OF
ATTORNEY, 1—SECURITY FOR

LACHES.

851

COSTS, 1—SETTING-ASIDE PRO-
CEEDINGS.

1. A defendant, against whom a *ca-
pias* issued, and afterwards an *exigi
facias*, rendered himself to the cus-
tody of the sheriff, who for default of
bail put him in prison. The affidavit
of debt was for 20*l.* and upwards,
on a promissory note, but it did not
state the amount for which the pro-
missory note was drawn. The de-
fendant brought trespass for false
imprisonment against the plaintiff in
the action:—*Held*, that such action
would not lie while the writ was in
existence, though, if the defendant
had applied to the Court, he would
have been discharged out of custody.
Reddell v. Pakeman, 714

2. The Court refused to set aside an
interlocutory judgment (which had
been irregularly signed three years
ago) upon payment of costs, though
proceedings by *scire facias* had been
only lately commenced. *Lewis v.
Browne*, 700

3. It is too late to rescind a Judge's
order allowing to the plaintiff's attor-
ney the costs of taxing the costs on
the back of a writ, of which more
than a sixth was taken off; after the
order has been made a rule of Court,
and an attachment obtained upon it.
Thompson v. Carter, 657

4. A writ was served on the 25th of
October. An application on the 3rd
of *November*, to set aside the service
for irregularity, (the 2nd being a
Sunday), was held to be out of time,
and that it should have been made on
the 1st. *Tyler v. Green*, 439

5. *Seemle*, that where costs have
been incurred by the delay of the de-
fendant in objecting to a defect in the
affidavit of debt, the Court will not
order the bail-bond to be delivered
up to be cancelled, although the de-
fect be in some degree one in sub-
stance and not in form. *Morgan v.
Bayliss*, 117

6. An application to set aside an interlocutory judgment for irregularity, after notice of inquiry on the 4th November, was held to be too late on the 12th. *Scott v. Cogger*, 212

LANCASTER (COURT OF COMMON PLEAS OF).

1. All the Judges are now Judges of the Court of *Common Pleas* at Lancaster, under the 4 & 5 Will. 4, c. 62. *Terns v. Fitzhugh*, 278

2. An award is not within section 26 of that act. *Ib.*

3. This Court has no power under the 4 & 5 Will. 4, c. 62, s. 26, to order judgment to be entered up *non obstante veredicto*, in a cause out of the Court of *Common Pleas* at Lancaster. *Potter v. Moss*, 432

LANDLORD AND TENANT.

See BANKRUPT—JUDGMENT AS IN CASE OF A NONSUIT, 2.

An application under the 1 Geo. 4, c. 87, that the defendant in ejectment should give security, may be made by one of several tenants in common, and it is not necessary that the attesting witness should depose to the execution of the lease, if it is sufficiently proved by other witnesses. *Doe d. Morgan v. Rotherham*, 690

LEVARI FACIAS.

See SEQUESTRATION.

LIBEL.

See VENUE, 3, 7.

LIEN.

See ATTORNEY AND CLIENT, 3—MASTER'S DISCRETION, 1—PLEAS (SEVERAL), 1—SET-OFF.

LIMITATION (STATUTE OF).

See PLEA, 17.

1. A writ issued to save the Statute of Limitations may be returned *non*

est inventus, and other writs issued upon it, though the defendant is about, and may be served; but the expense of such of the writs as are unnecessarily issued will not be allowed to the plaintiff. *Williams v. Roberts*, 512

2. The fact of the Statute of Limitations having run since the debt accrued, is no ground for setting aside the plaintiff's proceedings. *Potter v. Macdonel*, 583

LOCAL ACTION.

See VENUE, 4.

LORDS' ACT.

If the twenty days' notice required by s. 16 of the Lords' Act expires after the seven first days of term, the insolvent cannot be brought up till the next term. *Rogers v. Peckham*, 142

LORD OF BEDCHAMBER.

See PRIVILEGE FROM ARREST, 3.

LOST NOTE.

The Court will grant a rule to compute principal and interest on a promissory note, although it is clearly shewn that the note has been destroyed. *Clarke v. Quince*, 26

LUNATIC.

In order to obtain a *habeas corpus* to bring up a person confined in a lunatic asylum, it is necessary that the affidavit should shew that he is in a fit state to be removed, and that he is not a dangerous lunatic. *Ex parte —*, 161

MAGISTRATES' JURISDICTION.

A mere claim of a right to take certain tolls, without shewing clearly that it is a *bona fide* claim, is not sufficient to oust justices of the jurisdiction.

tion to convict for taking them improperly. *Rex v. The Justices of Hampshire*, 47

MAKER.

See PLEA, 18, 29—REJOINDER—REPLICATION, 6.

MANDAMUS.

See FOREIGN WITNESS, 1, 3.

1. A rule for a *mandamus* to examine witnesses in *India*, under the 13 Geo. 3, c. 63, s. 45, is *nisi* in the first instance. *Doe d. Grimes v. Pattison*, 35

2. If a parish clerk has been deprived of his office, the *mandamus* to restore him must be directed to the incumbent, and not to the churchwardens. *Ex parte Cirkett*, 327

3. To authorize such a *mandamus*, it must clearly appear that he has been deprived of his office. *Ib.*

4. *Semble*, that he may be deprived by the incumbent for cause. *Ib.*

MASTER'S DISCRETION.

See COSTS, 2—MERITS, 5.

1. In an action on the case, containing several counts in the declaration, some issues were found for the plaintiff, and some for the defendant:—*Held*, that the Master, in taxing the costs, was correct in deducting the costs of the defendant's issues from the plaintiff's costs, and that the lien of the plaintiff's attorney was only upon the balance coming to the plaintiff:—*Held*, also, that the expense of a witness called by the defendant, whose evidence was substantially directed towards the issues found for the defendant, was properly allowed to the defendant, although he gave some evidence upon the other issues. *Eades v. Everatt*, 687

2. A master of a vessel detained here as a necessary witness, was allowed in the taxation of costs the expenses of his living here, and his travelling expenses, and disallowed a claim of 7*l.* per month for wages, which, if he had sailed, he would have been entitled to:—*Held*, that the allowance was proper. *White v. Brazier*, 499

lowed in the taxation of costs the expenses of his living here, and his travelling expenses, and disallowed a claim of 7*l.* per month for wages, which, if he had sailed, he would have been entitled to:—*Held*, that the allowance was proper. *White v. Brazier*, 499

MASTER IN CHANCERY.

See COUNSEL'S SIGNATURE.

MERITS.

See PLEA (FRIVOLOUS)—POSTPONING TRIAL.

1. An affidavit in support of a rule for setting aside a judgment signed by the plaintiff for want of a plea alleged that the defendant had merits, and a good cause of defence to the action:—*Held*, insufficient. The affidavit must express that the defendant hath a good defence to the action on the merits thereof. *Lane v. Isaacs*, 652

2. An affidavit of merits, that the defendant has a good and sufficient defence on the merits, without words applying it to the particular action, is insufficient. *Tate v. Bodfield*, 218

3. An affidavit to set aside a regular judgment, made by the *London* agent to the country attorney, and stating that the deponent believed, from the instructions received from the country attorney, that the defendant had a good defence to the action on the merits:—*Held*, sufficient. *Schofield v. Huggins*, 427

4. A defendant had leave to add another bail on condition of making an affidavit of merits, which he did, but pleaded a plea by which the merits could not come in question. This was held not to be a virtual breach of the condition. *Riz v. Kingston*, 158

5. Where a motion is made by a defendant to set aside proceedings on

an affidavit of merits and payment of costs, the plaintiff is not entitled to go into a long statement in his affidavit to shew that the defendant has no merits, and, if he does, the Court will order the Master not to allow the costs of such statement. *Hearne v. Buttersby*, 213

MISNOMER.

1. A defendant, whose name was *Cocken*, was arrested upon a *capias* against him by the name of *Cocker*: he gave a bail-bond to the sheriff in the name of *Cocken* sued as *Cocker*; and the bail-bond being afterwards assigned to the plaintiff, he declared thereon against the defendant as *Cocken* sued by the name of *Cocker*. The defendant pleaded that no such writ as that stated in the declaration was issued against him. It was admitted that he was the real defendant. The plaintiff was nonsuited, but the Court set aside the nonsuit, and ordered a verdict to be entered for the plaintiff, because, in point of fact, there was a writ against the defendant by the name of *Cocker*:—*Held*, also, upon motion in arrest of judgment, that the declaration was bad, because a writ against *Cocker* did not authorize an arrest of *Cocken*, unless he was known as well by one name as the other, and there was no averment of that fact in the declaration; and that neither the 3 & 4 Will 4, c. 42, s. 11, nor the rule of H. T. 2 Will. 4, s. 32, had made any alteration in the law in this respect. *Finch v. Cocken*, 678

2. A defendant waives an objection of misnomer by taking out a Judge's order wherein he used the name by which he was arrested. *Nathan v. Cohen*, 370

NEGLIGENCE.

See NEW TRIAL, 1.

Where a plaintiff was nonsuited

through the neglect of the attorney's clerk to attend in Court, the Court refused to set aside the nonsuit except upon the terms of the plaintiff's attorney paying the costs occasioned by the defendant's attending to try. *White v. Sandell*, 798

NEW TRIAL.

See AWARD, 3—JUDGE'S NOTES—PLEA (ADDING)—SIMILITER—WRIT OF TRIAL, 1, 3.

1. At the assizes in *Yorkshire*, the causes are entered by the marshal in two lists, one for the *East Riding*, and the other for the *West Riding*. A cause having, by mistake, been entered by the marshal in the wrong list, was tried as an undefended cause, the defendant's attorney having searched only one list, without finding it. The Court granted a new trial, and held that the attorney was not bound to search both lists. *Hunter v. Hornblower*, 491

2. A witness objected to at a trial on the ground of interest, and held by the Judge to be incompetent without a release, was, to save time, allowed to be examined on the undertaking of the attorney that he should be released afterwards; the attorney, however, subsequently refused to do so, and a verdict having passed for the plaintiff, the Court refused on that ground to grant a new trial. *Heming v. English*, 155

3. Where the jury find a verdict in opposition to the evidence of a witness, and the credibility of the witness is left to the jury, the Court will not grant a new trial, though there was nothing to impeach the credit of the witness. *Lacey v. Forrester*, 663

4. Upon a trial under the writ of trial act, in an action on a promissory note, *semble*, that the note should be produced: but if the objection was not taken at the time, the non-pro-

duction of the note is no ground afterwards for a new trial. *Henn v. Neck*, 163

NON PROS.

See PAYMENT INTO COURT, 1—PLEA (OF PENDENCY OF SUIT).

Although a defendant is under terms to rejoin *gratis*, and take short notice of trial, the plaintiff cannot sign judgment of *non pros* for want of a rejoinder, unless a demand for that purpose has been made. *Seaton v. Skey*, 537

NOTICE.

See COSTS IN THE CAUSE—PLEA, 2.

NOTICE OF MOTION.

Notice to stay proceedings in the *Exchequer* is a two days' notice. *Hannah v. Wyman*, 673

NOTICE OF TRIAL.

See APPEAL (NOTICE OF).

A notice of trial before the sheriff for *Easter Tuesday* is good. *Charnock v. Smith*, 607

NULLITY.

See JUDGMENT—PLEA, 17.

NUL TIEL RECORD.

Upon an issue of *nul tiel record* the plaintiff gave notice to the defendant to produce the record; and upon his neglect to do so, moved for judgment. The Court held the notice to be irregular, and refused the rule. *Begbie v. Grenville*, 502

OATH.

See AFFIDAVIT, 2—EJECTMENT, 5.

OUTLAWRY.

1. The mere fact of a *præcipe* not being to be found, is no ground for setting aside proceedings to outlawry, if it is sworn that a *præcipe* was at one time left in the office. *Probert v. Rogers*, 170

2. Where a plaintiff proceeded against a defendant here and in *America* for the same cause of action, and the defendant was arrested in *America*, and took the benefit of the Insolvent Act there, the Court would not, on that ground, set aside the proceedings to outlawry which had been taken here, but left the defendant to plead these facts, it being sworn that he went abroad to avoid his creditors. *Probert v. Rogers*, 170

3. Upon a motion to set aside proceedings to outlawry, on the ground that the writ varied from the form given by the Uniformity of Process Act, it appeared that the writ was sued out by the plaintiff in person, and that the indorsement on the writ was, that it was issued by the plaintiff of *B. St., &c.*, instead of *residing at &c.*, which writ was filed on the 4th of *June*, and might have been seen at any time afterwards by the defendant in the office:—*Held*, that it was too late in *M. T.* to take advantage of the objection if it was maintainable, though it was positively sworn that the plaintiff never knew of the outlawry till six weeks before:—*Held*, also, that it was a mere irregularity in the writ, and the objection ought to have been taken by summons at chambers. *Lewis v. Davison*, 272

4. It is no objection that the writ appears to have been returned *non est inventus* before the four months expired, it being so done by order of a Judge, which it was not necessary should be noticed on the writ. *Ib.*

5. The exigent is not a writ within the 12th section of the Uniformity of Process Act. *Ib.*

6. A writ directing the proclamations to be made at the parish church is sufficient, though the act says "nearest church or chapel;" it not appearing by affidavit that there was was any nearer church or chapel. *Ib.*

7. *Seemle*, that the Court will make a conditional order for setting aside an outlawry, in order to prevent an insolvent from remaining in custody unnecessarily. *Nicholson v. Nichols*,

326

8. Upon an outlawry on mesne process, the sheriff, to a *capias utlagatum*, returned that the defendant was a beneficed clergyman, having no lay fee, but that he was rector of a rectory. The Court, upon motion, ordered a writ of sequestration to be issued to the Bishop. *Rex v. Armstrong*,

760

PALACE COURT.

See REMOVAL OF CAUSE—RENDER OF PRINCIPAL.

PARISH CLERK.

See MANDAMUS, 2, 3, 4.

PARTICULARS.

See JUDGMENT (FOR WANT OF A PLEA), 3—QUIA TIMET.

PAYEE.

See PLEA, 18, 21—REPLICATION, 6.

PAYMENT.

See PRISONER, 2.

PAYMENT (INTO COURT).

See COUNTY COURT, 1—PLEA, 20.

1. Where a defendant pleads payment of money into Court generally upon the whole declaration, and then pleads other pleas to all except as to the money paid in, and the plaintiff takes out the money paid in, and taxes his costs upon rule 19 of *H. T. 4 Will.* 4, in full satisfaction, the cause is at an end, and the defendant has no right to the costs of the subsequent pleas, nor can he sign judgment of *non pros* for want of a replication to them. *Coates v. Stevens*,

784

2. Where a defendant has several

PENALTIES.

defences to different parts of the plaintiff's demand, and intends to plead payment into Court as to other parts of the demand, he should first of all plead those pleas, and then the plea of payment of money into Court as to the residue only. *Coates v. Stevens*,

784

3. In trover for goods, the defendant pleaded payment of money into Court, and the plaintiff replied that he had sustained more damages: the defendant paid into Court the cost price of the goods, having offered the goods in specie to the plaintiff two days only after they ought to have been delivered. The plaintiff proved that he had sustained inconvenience and loss by not having the goods delivered at a proper time. The jury, however, found for the defendant, and the Court refused to set aside the verdict. *Evans v. Lewis*, 819

4. Where a defendant was sued at law for a sum of money, and the Court allowed him to pay it into Court to abide the event of an application by him to the Court of Chancery for an injunction, which was accordingly made in *January*, 1834, but the plaintiff having absconded without entering an appearance, the defendant was unable to get an injunction on the merits, though he had got the common injunction, this Court refused to make an order that the defendant might receive the money out of Court, though a considerable time had elapsed since the bill was filed. *Best v. Argles*,

701

PAYMENT (PLEA OF).

See PLEA, 5, 6, 19—PLEA (OF SET-OFF).

PENAL ACTION.

See ATTORNEY, 1—COMPOUNDING PENAL ACTION—INFORMER (COMMON).

PENALTIES.

See ATTORNEY, 1.

PENDENCY OF SUIT.

See PLEA (OF PENDENCY OF SUIT).

PEREMPTORY PAPER.

A rule drawn up in one term to shew cause in another is put into the peremptory paper, and parties ought to be prepared to shew cause on the day for which the rule is drawn up, and not on the following day, as is usual in other cases. *Warner v. Wood*, 262

PEREMPTORY UNDERTAKING.

See STET PROCESSUS.

PERJURY.

See AFFIDAVIT (USING)—STAYING PROCEEDINGS, 5.

PLAINTIFF (DESCRIPTION OF).

See AFFIDAVIT, 3—AFFIDAVIT (ENTITLING), 4.

PLAINTIFF (NAME OF).

See AMENDMENT, 3.

PLAINTIFFS CONSENT.

See STAYING PROCEEDINGS, 6.

PLEA.

See GENERAL ISSUE—JUDGMENT (FOR WANT OF A PLEA), 1, 2—JUSTIFICATION—MERITS, 4—PLEADING.

1. In debt on bond conditioned to perform the covenants in an indenture, the declaration set out the indenture with a covenant by which the defendant covenanted to pay 6000*l.* with 5*l.* per cent. interest on a particular day, clear of all taxes, &c. The breach alleged was, that the defendant did not pay the 6000*l.* on the day appointed, whereby the bond became forfeited. The defendant pleaded that he did pay on the day appointed the 6000*l.* with the interest due thereon, amounting to 6300*l.*, clear of all taxes, &c., according to

the covenant. Upon a special demurrer to this plea, on the ground that it attempted to put in issue the fact of payment of the interest, and also that it concluded to the country:—*Held*, that the plea was bad. *Bish-ton v. Evans*, 735

2. In an action by the indorsee against the drawer of a bill of exchange, the affidavit of debt alleged that the defendant was indebted to the plaintiff on the bill which was overdue, and that the money was still due and owing, but it omitted to aver either presentment or notice:—*Held*, bad. *Simpson v. Dick*, 731

3. To a declaration in *assumpsit* on a banker's check the defendant pleaded that there was no consideration either for the making or paying it. The replication stated that at the time of the making the check there was a good consideration. At the trial, it appeared that the plaintiff was an auctioneer, and had been employed to sell some property by auction; and that one of the conditions of sale was, that the purchaser should make a deposit. When the property was put up to sale, the defendant became the purchaser, and the check was given for the deposit in part payment. The payment of the check was resisted, on the ground that the property was misdescribed, and that the vendor was not in a condition to convey what he pretended to have sold. The Judge was of opinion that the property had been fraudulently misdescribed by the plaintiff, to enhance the price. A verdict was taken for the plaintiff, subject to the opinion of the Court, whether or not the defence could be given in evidence upon this plea:—*Held*, that, though the plea would have been bad on demurrer, it was sufficient after verdict; and that, as the plaintiff's fraud rendered the transaction null and void *ab initio*, the plea was proved, and that the verdict should therefore be entered

for the defendant. *Mills v. Oddy*, 722

4. Upon a plea of no consideration to an action on a promissory note, to which the plaintiff replied that there was a consideration, the *onus* of proving that there was no consideration lies upon the defendant. *Lacey v. Forrester*, 668

5. A plea of payment into Court must follow the form given by the new rules, and if other pleas are pleaded to part of the plaintiff's demand, the plea of payment into Court should be put last, and pleaded to the residue. *Sharman v. Stevenson*, 709

6. A special demurrer to a plea of payment of money into Court, that "it varies from the form given by the rule," is sufficient to raise an objection that the plea is bad for want of a proper conclusion of a prayer of judgment. *Ib.*

7. If a good cause of action at common law appear in the declaration, the defendant must, under the Pleading Rules of *H. T. 4 Will. 4*, plead any statutable illegality in the contract on which it is founded in answer. *Barnett v. Glossop*, 625

8. *Semble*, that the general issue, with power to give the special matter in evidence, is abolished in all cases whatever, except where specially allowed by statute. *Ib.*

9. Under the Pleading Rules of *H. T. 4 Will. 4*, the illegality of work and labour done cannot be given in evidence under the plea of *non assumpsit*, but must be pleaded, although the illegality be not inferential, but essential. *Potts v. Sparrow*, 630

10. In an action on an attorney's bill, the defendant's attorney suffered judgment to go by default, which was set aside on an affidavit of merits and payment of costs, and the defendant was let in to plead. She pleaded that no signed bill had been delivered, and afterwards added two pleas of non-

assumpsit, and that the plaintiff had not taken out his certificate. The plaintiff, on application to a Judge at chambers, obtained an order, confining the defendant to the plea of the general issue. The Court held that this order was proper, it appearing that the defendant had had the bill taxed. *Biggs v. Maxwell*, 497

11. In *assumpsit* on a bill of exchange, by the drawer against the acceptor, the defendant pleaded, that at the time of the defendant giving the bill of exchange, it had been agreed that the plaintiff should consign certain goods to *J. N.* abroad, to be there sold, and that the defendant should accept the bill, but that the amount should be remitted to the defendant out of the proceeds of the goods; and that if the goods should not be sold, or the proceeds received before the bill arrived at maturity, that the bill should be renewed. The plea then averred that the proceeds had not arrived, and that the bill became due, and that the defendant offered to give a renewed bill, but that the plaintiff refused to take it, and requested that the defendant, in lieu thereof, would write a letter relinquishing his right to receive the proceeds; which letter the defendant accordingly wrote. The plea then concluded by averring that the defendant had not received any value or consideration for the payment of the bill of exchange:—*Held*, upon special demurrer, that the plea was not bad for duplicity, and that it was a good plea of accord and satisfaction; but that the averment that the defendant had received no consideration was repugnant. *Byas v. Wylie*, 524

12. In an action on the case, the defendant cannot now, under the plea of "not guilty," raise any objection as to defective proof of the inducement in the declaration. *Dukes v. Gostling*, 619

13. In *assumpsit* for refusing to allow the plaintiff to proceed with certain work according to agreement, the defendant pleaded that the work was to be done to the satisfaction of *A. B.*, and that part of the work which was done was not done to his satisfaction, and that therefore he discharged the plaintiff:—*Held*, that upon this issue it was not necessary for the defendant to call *A. B. Vickers v. Cock*, 492

14. In an action by an indorsee against the acceptor of a bill of exchange, a plea that there was not at any time any consideration for his the said defendant's acceptance or paying the said bill of exchange, was held bad on special demurrer. *Reynolds v. Ivimey*, 453

15. To *assumpsit* upon an agreement to guarantee the payment of goods supplied to a third person, the defendant pleaded, that, after that agreement was made, and before any breach, the defendant agreed with the plaintiff to pay for any goods supplied, by accepting a bill at three months: upon demurrer, assigning for cause that the agreement was not alleged in the plea to be in writing, and that it only varied the time of payment stated in the declaration:—*Held*, that the plea was sufficient.

Quære, whether in an action for goods sold it can be shewn under the general issue that the time of credit has not expired? *Taylor v. Hilary*, 461

16. In *assumpsit* on a bill of exchange by the indorsee against the immediate indorser, the defendant pleaded that he indorsed the bill to the plaintiff without *having* or *receiving* any consideration: upon which the plaintiff took issue in the terms of the plea. After verdict for the defendant, the plaintiff moved for judgment *non obstante veredicto*, on account of the insufficiency of the plea:—*Held*, that the plea was good

after verdict, though it might have been objected to on special demurrer. *Easton v. Pratchett*, 472

17. A plea of the Statute of Limitations requires to be signed by counsel.

The general issue being pleaded to part of a declaration, and the Statute of Limitations to the remainder, without the signature of counsel:—*Held*, that the whole plea was a nullity. *Macher v. Billing*, 246

18. To an action on a promissory note, by the executors of the payee against the maker, the defendant pleaded that he made the note without any consideration:—*Held* bad upon special demurrer. *Stoughton v. The Earl of Kilmorey*, 705

19. In *assumpsit* the defendant pleaded as to 14s. parcel, &c., that before the commencement of the suit he paid the same to the plaintiff; and, as to the residue of the said monies, that he did not promise as in the declaration is alleged, and of this he puts himself upon the country. The plaintiff having specially demurred, alleging duplicity, and the want of a proper conclusion with a verification, the Court held the plea bad, and that judgment for the plaintiff must be upon the whole plea. *Ansell v. Smith*, 193

20. To a declaration in *assumpsit*, the defendant pleaded as to all except 20l. 9s. *non-assumpsit*; and as to that sum, that the defendant, being in embarrassed circumstances, the plaintiff and other creditors agreed to take 5s. in the pound, and that the defendant was ready and willing to pay the amount of the composition, but the plaintiff refused to receive it, and discharged the defendant from payment of it:—*Held*, that the plea was no answer to the sum agreed to be taken for composition, because no consideration was stated for the plaintiff's discharging the defendant from

paying it, and that therefore the agreement as to that was void. The plea was allowed to be amended by paying that sum into Court. *Cooper v. Philipps*, 196

21. In an action by indorsee against acceptor, a plea that the bill was accepted for the accommodation of the payee, and without any consideration, and that it was indorsed after it became due, was held bad on demurrer; and also another plea, that the bill was indorsed after it was due, and that the payee at the time of the indorsement was indebted to the defendant in a larger sum than the amount of the bill. *Stein v. Yglesias*, 252

22. The *Reg. Gen. H. T. 4 Will. 4* do not enable defendant in an action on a bill of exchange at the suit of an indorsee, to plead that he received no consideration from the drawer, without shewing circumstances of fraud and knowledge of them on the part of the plaintiff. *French v. Archer*, 130

23. In an action by the indorsee against the indorser of a promissory note for 500*l.*, the defendant pleaded as to 300*l.*, that the note was indorsed by the defendant for the accommodation of the maker, and as a security to the plaintiffs, who were the maker's bankers, for subsequent advances, and that only 200*l.* was subsequently advanced, and that therefore, as to 300*l.*, there was no consideration. The plaintiffs replied that they were holders of the note for value given to the drawer to the full amount:—*Held*, that upon this issue it was not incumbent on the plaintiff to give any evidence, unless his title was impeached by the defendant, and that he was entitled to recover the whole amount of the bill. *Percival v. Framplin*, 748

24. To a declaration in trover, the defendant pleaded the general issue since the new rules came into operation. At the trial the defendant proposed to prove that he was a partner

with the plaintiff, and took the goods and sold them to pay a partnership debt: this evidence was rejected, and the plaintiff obtained a verdict. On a motion for a new trial:—*Held*, that the defendant was not precluded by the new rules from disputing the plaintiff's sole right of property, but that the defence ought to have been specially pleaded by way of confession and avoidance. *Stancilffe v. Hardwick*, 762

PLEA (ADDING).

In an action for slander, after a verdict for the plaintiff with 100*l.* damages, the Court refused to allow the defendant to have a new trial and to be allowed to plead the truth of the words upon any terms, though it was alleged that there was ample evidence to support a justification, and the general issue only was pleaded through the mistake of the pleader, which was not discovered till the day before the trial, by the counsel, when an application had been made for leave to add a justification; but the defendant did not swear that he had never used the words, and one of the witnesses had pointed out the want of a special plea a considerable time previously. *Kirby v. Simpson*, 791

PLEA (FRIVOLOUS).

A plea that the defendant was not detained in custody as alleged in the declaration, was held not to be such a vexatious and frivolous plea as to deprive the defendant of his right to add the general issue, there being an affidavit of merits. *Rix v. Kingston*, 159

PLEA (OF PAYMENT INTO COURT).

See PAYMENT INTO COURT, 1, 2, 3.

PLEA.

PLEA (OF PENDENCY OF SUIT).

If a defendant nonprosses a plaintiff in a particular action, he cannot afterwards plead its pendency in answer to an action for the same cause in another Court. *Pepper v. Whalley*, 579

PLEA (OF PRIVILEGE).

A plea of privilege cannot be distinguished from a plea in abatement, and must be accompanied by an affidavit of verification. *Davidson v. Watkins*, 129

PLEA (OF SET-OFF).

In an action for use and occupation, since the new rules, it cannot be left to the jury to say whether the evidence produced by the defendant does not amount to an admission, by the plaintiff, that he has been paid, and that nothing is due, without a plea of payment or settlement; and such evidence is inadmissible under a plea of set-off for money due on an account stated between the parties. *Linley v. Polden*, 780

PLEA (SIGNING).

See SERJEANT.

PLEA (STRIKING OUT).

Where there are two pleas to the whole action, upon one of which issue is joined to the country, and upon the other judgment is given for the defendant upon demurrer, the Court will allow the defendant to strike out the general issue. *Young v. Beck*, 804

PLEAD (RULE TO).

See WAIVER.

PLEADING.

See AMENDMENT, 1—ATTORNEY, 2—BANKRUPT—COUNTY COURT, 2—DECLARATION—DEMURRER—EXECUTOR, 6—MISNOMER, 1—PAY-

PLEAS (SEVERAL). 861

MENT INTO COURT, 1, 2—PLEA—PLEAS—REJOINDER—REPLEADER—REPLICATION.

The new rules of pleading are confined to such actions as all the Courts have jurisdiction over, and therefore do not extend to real actions. *Miller v. Miller*, 408

PLEADING (TIME FOR).

See SECURITY FOR COSTS, 5—WAIVER.

1. Where the plaintiff will not be materially prejudiced by the delay, the Court will, under certain circumstances, grant the defendant a year's time to plead. *Hunt v. Barclay*, 646

2. If a defendant obtains an enlarged time for pleading previous to the 10th of August, but which does not expire on that day, he is entitled to the remainder of the enlarged time after the 24th of October, for the purpose of pleading. *Trinder v. Smedley*, 87

PLEAS (INCONSISTENT).

See BANKRUPT—PLEAS (SEVERAL), 2.

1. Inconsistent pleas may be pleaded under the new rules, if intended *bonâ fide* to support different substantial grounds of defence. *Duer v. Triebuer*, 133

2. It is no objection to pleas that they are inconsistent. *Wilkinson v. Small*, 564

PLEAS (SEVERAL).

See PLEAS (INCONSISTENT).

1. To a declaration in trover, the defendant was allowed to plead a right of lien by agreement, a right of lien by usage, and the same usage in two other pleas, but with reference to a delivery of the goods by two different parties. *Leuckhart v. Cooper*, 415

2. Pleas of *non assumptit* and part payment will not be allowed together, nor a plea of a warranty with sample,

and a plea founded on the warranty implied in law. *Steill v. Sturry*, 183

POLICE OFFICER.

Officers of the metropolitan police, acquitted in actions brought against them for matters done in the execution of the 10 Geo. 4, c. 44, s. 41, are entitled to their costs as between attorney and client, notwithstanding a certificate granted under the 3 & 4 Will. 4, c. 42, s. 32. *Humphrey v. Woodhouse*, 416

POSTPONING TRIAL.

See WRIT OF TRIAL, 2.

A motion to postpone a trial, on account of the absence of a material witness, need not be supported by an affidavit of merits. *Hill v. Prosser*, 704

POUNDAGE.

See SHERIFF, 6

PRESENTMENT.

See PLEA, 2.

PRESUMPTION.

See DEPOSIT IN LIEU OF BAIL, 3.

PRINCIPAL AND SURETY.

See BAIL, 10.

PRISONER.

See BAIL, 7, 14.

1. A defendant on being arrested for the amount of a promissory note, proposed to give bail, but being told that a *cognovit* would be cheaper, he consented to give a *cognovit*. He was then told that it was necessary he should have an attorney present, and two attorneys were mentioned to him, and he said he did not care which he had; afterwards he called with the officer at the office of one of the two proposed attorneys, who asked him if he wished him to act as his attorney, to which the defendant answered "yes," and that attorney accordingly attended and acted for him; and the *cognovit*, after having

PRODUCTION.

been read to him, was signed by him and the attorney:—*Held*, that the rule of *H. T. 2 Will. 4, s. 72*, was complied with:—*Held*, also, that after giving a *cognovit*, it was too late to object, that, at the time of the arrest, part of the note had been paid, and that the note was given for an illegal consideration. *Bligh v. Bremer*, 266

2. If the debt and costs in an action are paid to the plaintiff, no matter by whom, the defendant is entitled to be discharged out of custody. *Rimmer v. Turner*, 601

PRIVILEGE FROM ARREST.

1. The Court refused to interfere on motion for the purpose of relieving a defendant who had been held to bail, on the ground of his being the *Somerset* herald, and liable to be called on to attend the King, whenever and wherever he chose, it not appearing clearly by the affidavits what were the duties of his office, and no instance shewn of the claim being allowed. Where there is any doubt, the rule is, to leave such persons to their writ of protection. *Leslie v. Disney*, 437

2. One of the King's chaplains being arrested for debt, and having given bail, the Court, on motion, directed the bail-bond to be delivered up to be cancelled. *Byrn v. Dibdin*, 448

3. A lord of the bedchamber is privileged from arrest. *Aldridge v. Barry*, 450

PROCEDENDO.

The 21 Jac. 1, c. 23, s. 3, as to *procedendo*, does not extend to applications by bail. *Glynn v. Hutchinson*, 529

PRODUCTION OF DOCUMENT.

See FOREIGN WITNESS, 2.

PROMISSORY NOTE.

PROMISSORY NOTE.

See PLEA, 4, 18, 23—REJOINDER—
REPLICATION, 6—VENUE, 11.

QUIA TIMET.

Where the writ was in trespass on the case, and the particulars of demand claimed a debt, and an application was made to set aside the writ as irregular, before it appeared that a declaration had been actually filed, the Court refused a motion for setting the writ aside as being too early. *Addis v. Jones*, 164

REAL ACTION.

See DECLARATION, 1.

RECOGNIZANCE.

See ESTREAT.

RECOGNIZANCE (TO TRY).

Where a defendant entered into a recognizance to appear to and try an indictment for perjury against her in *Trinity* term, and she had appeared and pleaded to the indictment, but the indictment had not been tried, the Court would not in *Michaelmas* term discharge the recognizance, but ordered that it should not be put in suit before the last day of the term. *Rex v. Grote*, 255

RECORD (WITHDRAWING).

See COSTS OF THE DAY, 2.

REJOINDER.

See PLEADING.

To a declaration on a promissory note against the maker, he pleaded no consideration; the plaintiff replied that the note was indorsed to her in part payment of a debt, and that she had no notice of the premises in the plea. The defendant rejoined that she had notice. On demurrer: —*Held*, that the plaintiff was entitled to judgment. *Pearce v. Champneys*, 276

REPLICATION. 863

REMOVAL (OF CAUSE).

See CENTRAL CRIMINAL COURT—INFERIOR JURISDICTION, 1, 2.

If a writ of *habeas corpus* to remove a cause from the Palace Court, wherein judgment has been suffered by default, is not delivered until after the jury have assessed the damages on the writ of inquiry, the Court will issue a *procedendo*. *Smith v. Sterling*, 609

REMOVAL (ORDER OF).

See APPEAL (ADJOURNMENT OF).

RENDER.

See ATTACHMENT, 3—BAIL (RELIEF OF), 1.

RENDER OF PRINCIPAL.

Where judgment had been obtained in an action in the Palace Court, where the defendant was in custody, the Court would not, at the instance of the bail for the same defendant in another action in the *Exchequer*, issue a *habeas corpus* to the Palace Court, for the purpose of removing the cause there, with the body of the defendant, in order that the bail might render him in the action in the *Exchequer*. *Laves v. Hutchinson*, 506

REPLEADER.

In an action on a bill of exchange the defendant pleaded a plea of want of consideration, concluding with a verification: the plaintiff, instead of replying by taking issue on the plea, merely added a *similiter*. After verdict for the plaintiff, the Court *held*, that the record was imperfect, and that there must be a replader; but, to save expense, the plaintiff was allowed to amend on payment of costs. *Wordsworth v. Brown*, 698

REPLICATION.

See PLEADING.

1. A replication is bad although it

follows the very words of the plea, if it does not answer it in substance.

Moore v. Bolcott, 145

2. Where a defendant is under terms to plead issuably, the plaintiff cannot reply double; and if he do, the Court will give leave to the defendant to assign it as cause of demurrer, and will allow it to beargued.

Gisborne v. Wyatt, 505

3. Where, in an action on a bill of exchange by an indorsee, it is pleaded by the acceptor that the drawer is a married woman, the plaintiff may shew in his replication that she drew and indorsed the bill with the authority of her husband, without its being deemed a departure. *Prince v. Brunalt*, 382

4. Where an acceptor, to an action on a bill of exchange by an indorsee, pleads want of consideration, it is sufficient for the plaintiff, in his replication, simply to aver that there was consideration. *Prescott v. Levi*, 403

5. When an acceptor to an action on a bill of exchange by an indorsee, pleads want of consideration and fraud, the plaintiff need not, in his replication, state the consideration at length.

Seemle, that it would be sufficient simply to negative the fraud, and allege consideration without stating its nature. *Bramah v. Baker*, 392

6. To an action on a promissory note by the payee against the maker, the defendant pleaded, that, after the accruing of the cause of action to the plaintiff, he drew on the defendant a bill of exchange for a larger amount, for and on account of the said note, which the defendant accepted and delivered to the plaintiff, who took it on account of the said note;—*Held*, that this plea was bad, as well because it did not aver that the bill was accepted or delivered by the defendant on account of the previous note, as

also that it did not shew that it was given or received in satisfaction.

To the above plea the plaintiff replied that the defendant neglected to pay the note of his own wrong, and without the cause alleged in the plea. To which the defendant demurred, assigning for special cause, that it was multifarious, and too general, and not proper in an action on promises.

Seemle, that this replication (if properly pleadable under any circumstances in such an action as the present) was bad in this instance, as being inapplicable to the plea, and therefore not putting the matters of the plea in issue; for the plea did not shew any cause for breaking the promise in the declaration, but merely stated a matter which had occurred subsequently, shewing that the plaintiff's right of action was suspended or transferred. *Crisp v. Griffiths*, 752

7. To *assumpsit* for goods sold, &c. the defendant pleaded as to 9l., part of the debt, that he, at the plaintiff's request, put his name as acceptor to a stamped bill of exchange for 20l. (there being no drawer's name to it), partly for the debt, and partly for his accommodation, and delivered the same to the plaintiff, who accepted it in payment of the debt, and that the bill had not become due at the time the action was commenced. The plaintiff replied that the bill then remained in his hands unnegotiated and unpaid, and without any drawer's name put to it:—*Held*, that this replication was no answer to the plea, and that the plea was good. *Quære*, whether it would have been held good if it had been demurred to? *Simon v. Lloyd*, 813

RE-SEALING RECORD.

RE-SEALING RECORD.

See *Sittings*, 1.

RESIDENCE (OF ATTORNEY).

See *RESIDENCE OF DEFENDANT*, 1—*SERVICE OF WRIT*, 2, 4, 5, 6.

1. "*Southampton Buildings*" is an insufficient description of an attorney's residence, in the indorsement on a writ of *capias*; but a lapse of more than two months from the time of the arrest is too great to enable a defendant to avail himself of the objection. *Rust v. Chine*, 565

2. "*Gray's Inn, London*," is a good description of an attorney's residence under the provisions of 2 *Will.* 4, c. 39, s. 12. *Jelks v. Fry*, 37

RESIDENCE (OF DEFENDANT).

See *CAPIAS*, 1, 6—*SERVICE (OF DECLARATION)*—*SERVICE (OF RULE)*, 2, 3, 4, 5, 6.

1. A defendant (an attorney) was described in a writ of summons as of "*Paper Buildings, Temple*:"—*Held*, sufficient. *Morris v. Smith*, 698

2. "*Yorkshire*" is a good description of a defendant's residence, although he resides at the town of *Kingston-upon-Hull*, if he may be supposed to be resident in the former county. *Jelks v. Fry*, 37

RESIDENCE (OF PLAINTIFF).

A plaintiff, being called upon for his place of residence, gave *Peel's Coffee House, Fleet Street*:—*Held*, not sufficient, and proceedings were stayed till he gave a better place of residence. *Hodgson v. Gamble*, 174

RETURN OF WRIT.

See *DECLARATION*, 1.

1. A Judge's order for returning a writ cannot, in the *K. B.*, be made a rule of Court, and an attachment for

SCIRE FACIAS. 865

disobedience thereto obtained on one motion. *Stainland v. Ogle*, 99

2. One motion is sufficient (in the *Exchequer*) to make a Judge's order to bring in the body, or to return a writ, a rule of Court, and for an attachment for disobedience to it. *Howell v. Bulteel*, 99

REVENUE.

See *DEMURRER*, 5.

REVIVING RULE.

See *RULE (ENLARGING AND REVIVING)*.

RULE (ENLARGING AND REVIVING).

See *AFFIDAVIT (ENTITLING)*, 6.

If a rule is drawn up to shew cause in one term, it cannot be made absolute in the next term without enlarging; but it may be revived. *Smith v. Collier*, 100

RULE (TO COMPUTE).

See *LOST NOTE*—*SERVICE OF RULE*, 3, 6.

RULE (TO PLEAD).

See *WAIVER*.

SCIRE FACIAS.

1. Upon a motion to revive a judgment by *scire facias*, the validity of the judgment cannot be impeached for the purpose of opposing that motion, but a separate application must be made to set aside the judgment. *Thomas v. Williams*, 655

2. Since the Uniformity of Process Act, it is irregular for a *sci. fa.* to recite the action as commenced "by bill, without our writ," if it has been commenced by summons. *Peacock v. Day*, 291

3. It is irregular in a *sci. fa.* to state the bail to have been put in on a day previous to the issuing of the writ. *Ib.*

4. It is an immaterial objection to a *sci. fa.* that it is tested on the 3rd November, and returnable on the 15th November "next coming." *Peacock v. Day*, 291

5. It is not necessary for a party in a *sci. fa.* to return the demurrer book; and, therefore, a judgment signed for not returning it is irregular. *Baylis v. Hayward*, 533

SCOTLAND.

See FOREIGN WITNESS, 1.

SECURITY FOR COSTS.

1. Where a plaintiff is guilty of laches in declaring, the defendant is not deprived of his claim to security for costs by obtaining time to plead. *Fry v. Wills*, 6

2. The Court refused to grant a rule, calling upon the defendant in replevin to find security for costs, although it was sworn that neither the defendant nor the broker were able to pay them, and the defendant had taken the benefit of the Insolvent Act. *Hiskett v. Biddle*, 634

3. A rule *nisi* for security for costs, with a stay of proceedings, will not be allowed on the last day of term. *Gronow v. Pointer*, 571

4. If a plaintiff be permanently resident abroad, and is only occasionally in this country, he will be liable to give security for costs. *Gurney v. Key*, 559

5. Obtaining an order for time to plead does not preclude a defendant from obtaining security for costs. *Id.*

SEQUESTRATION.

See OUTLAWRY, 8.

1. A *levari facias*, though lodged with the bishop, does not begin to operate till the writ of sequestration upon it is published. *Wait v. Bishop*, 234

2. Arrears of by-gone composi-

SERVICE (OF RULE).

tions for tithes do not pass under a sequestration, neither do they pass to the assignees of the rector under the Insolvent Debtors' Act. *Wait v. Bishop*, 234

SERJEANT.

The old rule of practice in the *Common Pleas* requiring pleas to be signed by a Serjeant is virtually repealed by his Majesty's warrant of 24th April, 1854, throwing open that Court. *Power v. Fry*, 140

SERVICE (UNDER ARTICLES OF CLERKSHIP).

Where a clerk has been unavoidably absent from his master's service for several months during the five years, but has served a similar period at the expiration of his articles, he may be admitted. *Ex parte Frost*, 322

SERVICE (OF DECLARATION).

Where the defendant's residence is unknown, application must be made to the Court in the first instance for leave to serve the declaration in a particular manner: and if the declaration is left at the defendant's last place of abode, the Court will not afterwards declare such service to be good. *Troughton v. Craven*, 436

SERVICE (OF NOTICE OF DECLARATION).

Where, in the service of a notice of declaration, the probabilities are that it has come to the hands of the defendant, and the latter does not deny that it had come to his knowledge, the Court will not set aside the service. *Rolfe v. Brown*, 628

SERVICE (OF RULE).

1. In moving for an attachment against the sheriff for not bringing in the body, it is sufficient to swear,

SERVICE (OF RULE).

that the original rule and not a copy was served on the under-sheriff.

Leaf v. Jones, 315

2. Service of a rule by sticking it up in the office will not be allowed upon an affidavit that the attorney's residence is unknown, unless it is also sworn that the party's residence is unknown. *Wright v. Gardiner*, 657

3. Service of a rule nisi to compute on the defendant's landlady is not sufficient. *Gardner v. Green*, 343

4. An affidavit of the service of a rule nisi at the chambers of an attorney, by leaving it with a laundress there, held insufficient, because it did not state that the deponent believed her to be the defendant's servant. *Kent v. Jones*, 210

5. An affidavit of service, by leaving a rule at the defendant's chambers with a female servant there, held insufficient. *Alanson v. Walker*, 258

6. Service of a rule nisi to compute, by putting it under the door of the defendant's chambers, is not sufficient, although the laundress states that the defendant will probably have the rule in the course of the day. *Strutton v. Hawkes*, 25

SET-OFF (OF COSTS).

See MASTER'S DISCRETION.

1. Sec. 93 of *Reg. Gen. Hilary*, 2 *Will.* 4, only applies to cases of set-off between adverse parties. *George v. Elston*, 419

2. Where a plaintiff succeeds against one defendant, but fails against others, the defendant who fails may set-off the costs of the defendants who succeed. *Ib.*

4. Where several defendants are sued in trespass, and a verdict is found for the plaintiff on some of the issues against some of the defendants, and against him on all the other issues, the plaintiff is entitled to the

SEVERAL WRITS, &c. 867

balance only of the costs, after deduction of all the costs of all the defendants. *Starling v. Coxens*, 782

5. Where there are several defendants, and one alone employs an attorney for all, the others are not entitled to claim any costs. *Ib.*

SETTING ASIDE PROCEEDINGS.

After execution executed in an action of ejectment, the Court will not set the proceedings aside on payment of the rent due and costs of the action, if there are other grounds of forfeiture besides the nonpayment of rent; and if such an application be made, the Court will dismiss it with costs. *Doe d. Lambert v. Roe*, 557

SETTLING ACTION.

See ATTORNEY AND CLIENT, 2.

SEVERAL DEFENDANTS.

Several defendants sued as partners defended separately, and appeared by different counsel, each of whom cross-examined the plaintiff's witnesses, and made a speech to the jury in favour of his own particular client:—*Held*, regular. *Ridgway v. Phillips*, 154

SEVERAL WRITS FOR THE SAME CAUSE OF ACTION.

See ATTORNEY AND CLIENT, 1.

1. A plaintiff may, without discontinuing, arrest a defendant for a cause of action, although he has proceeded in an action commenced by serviceable process for the same cause, so far as to put it down for trial. *Brickline v. Smallwood*, 569

2. A plaintiff may arrest a defendant after suing out three serviceable writs, the actions commenced by which he has not discontinued. *Chapman v. Valdevelde*, 313

SHERIFF.

See ATTACHMENT (AGAINST THE SHERIFF)—ATTACHMENT, 3—BAIL-BOND, 6, 7—CAPIAS, 1, 4, 7—DECLARATION, 2—INTERPLEADER—OUTLAWRY, 8.

1. A *f. fa.* was put into the sheriff's hands on the 14th December, 1833, returnable on the 30th. The sheriff went out of office on the 14th of February following. A rule to return the writ was taken out in June following, which was served in the same month on the undersheriff of the new sheriff; but it was not served on the undersheriff of the old sheriff till November following:—*Held*, that an attachment afterwards obtained against the old sheriff for not returning the writ was irregular; and the Court set it aside. *Yaroth v. Hopkins*, 711

2. The sheriff is bound to pay the necessary fee for opening the treasury during vacation, in order to file his return, if an order to make the return under sect. 15 of the Uniformity of Process Act has been made. *Rex v. The Sheriff of Surrey*, 82

3. *Quære*, whether the delivery of a writ to the deputy, under the 3 & 4 Will. 4, c. 42, binds the goods as if the writ had been delivered to the sheriff himself. *Brackenbury v. Laurie*, 180

4. Where a sheriff seizes and sells goods under an execution, and it afterwards appears that the sheriff was not warranted in levying on the goods, in consequence of which an action of trover is brought against the sheriff, the jury, in estimating the damages, may deduct the costs and expenses necessarily incurred by the sheriff in bringing the goods to sale. *Clarke v. Nicholson*, 454

5. A sheriff, under special circumstances, may be compelled to return a writ of *f. fa.*, although he has been

three years out of office, and has, by leave of the Court, withdrawn from possession of the property seized. *Willon v. Chambers*, 333

6. The sheriff cannot be required to pay into Court money levied under an attachment, but he is not entitled to his poundage on the sum levied. *Rex v. Sheriff of Devon*, 10

7. On a motion for setting aside an attachment against the sheriff on terms, the affidavit ought to state at whose expense the motion is made. *Rex v. The Sheriff of Surrey*, 174

8. *Semble*, that the sheriff has no right to detain a defendant in custody, although he has been compelled to pay the debt and costs under an attachment. *Rimmer v. Turner*, 601

9. After a judgment in the County Court has been set aside, though not at the instance of the parties, the Court will not compel the sheriff to issue execution on it. *Eldridge v. Fletcher*, 588

SHERIFF'S NOTES.

See WRIT OF TRIAL, 3, 4.

SHERIFF'S OFFICER.

The Court refused to interfere in a summary way to compel a sheriff's officer to fulfil an undertaking given to a plaintiff. *Brown v. Gerard*, 217

SHERIFF'S RETURN.

See SHERIFF, 2, 5.

Semble, that where one sheriff has made a special return to a writ of *capias*, the Court will not compel his successor to make another, the circumstances remaining unaltered. *Pasmore v. Wilkinson*, 635

SHERIFF'S WARRANT.

See VARIANCE.

SIMILITER.

To an action on a bill of exchange against an indorser, the defendant

SIMILITER.

pleaded that he had no notice of presentment, and concluded his plea to the country. The plaintiff omitted to add the *similiter*; and after a verdict for the plaintiff, the defendant moved for a new trial because there was no issue joined: but as the plea concluded with an "&c."—*Held*, that, after verdict, the "&c." might be considered to include the *similiter*, and that the record was sufficient. *Swain v. Lewis*, 700

SITTINGS.

1. Where a plaintiff is prepared to try at one sittings, but, from the press of business, the cause does not come on, and those sittings last till the second sittings commence, but the plaintiff is obliged to withdraw his record on account of its not having been resealed, he is still not liable to the costs of the first sittings. *Waters v. Weatherby*, 328

2. Where three causes stood over by adjournment from one sitting day in term to another, and before they were tried the defendant died, the Court refused to name a special adjournment day in term for the trials of the causes to prevent the suits abating. *Johnson v. Budge*, 207

3. *Semble*, that the sittings in term are not regarded as one sitting in law, so that a trial at any sitting day would have relation to the first day of the sittings. *Ib.*

SLANDER.

See ARREST OF JUDGMENT—ERROR, 1—INFANT—PLEA (ADDING).

In an action on the case for words spoken of the plaintiff as a schoolmaster, without an allegation of special damage, the jury found a verdict for twenty shillings damages only, but the Judge certified to give the plaintiff full costs:—*Held*, that he had no power to do so; and the Master, having in consequence of the certificate,

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taxed to the plaintiff his full costs, was ordered to review his taxation. *Goodall v. Ensell*, 743

SMALL DEBTOR.

1. Though the judgment is in debt for 100*l.*, yet if the execution against the defendant is for less than 20*l.*, the defendant may be discharged out of custody, after being in prison 12 months, without reducing the judgment. *Harris v. Parker*, 451

2. An application under the 48 *Geo. 3*, c. 123, must be made to the Court out of which the process issues. That act does not apply to attachments. *Pitt v. Evans*, 649

SOMERSET HERALD.

See PRIVILEGE FROM ARREST, 1.

SPECIAL JURY.

See JUDGMENT (AS IN CASE OF A NON-SUIT), 4.

The usual rule having been obtained for a special jury by the defendant, a Judge at chambers, upon the statement of the plaintiff's attorney, without affidavit, ordered a special jury to be struck next day. The Court refused to set aside that order as being irregular. *Joseph v. Perry*, 699

SPECIAL CONTRACT.

See GENERAL ISSUE.

STAKEHOLDER.

See INTERPLEADER, 6, 7, 14, 15.

STAMP.

See COGNOVIT, 1, 2, 4.

STAY OF PROCEEDINGS.

See ATTORNEY'S BILL, 1—INTERROGATORIES, 1—INTERPLEADER, 6.

STAYING PROCEEDINGS.

Where the plaintiff is suing as a trustee, and there are circumstances of suspicion in the case, the Court

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will stay proceedings on payment of the debt into Court, and on payment of costs; leaving the plainiff to apply to the Court to have his extra costs out of the fund in Court. *Jones v. Bramwell*, 488

2. Proceedings were commenced on a bill of exchange, against the drawer and also against the defendant as acceptor; the former paid the bill and costs, and it was delivered up to him, and notice was given to the defendant that proceedings against him were abandoned. His costs, however, were not paid, and as he disputed his liability as acceptor, he ruled the plainiff to declare, who then applied to a Judge to stay proceedings, and obtained an order for that purpose: the Court set the order aside. *Lewis v. Dalrymple*, 433

3. A defendant who moves to stay proceedings on payment of debt and costs, is not entitled to a rule for that purpose as a matter of right, but must submit to such reasonable terms as the Court in its discretion may think proper to grant. *Jones v. Shepherd*, 421

4. In an action of *detinue* for deeds, the Court will, on delivery up of a portion of them, either stay proceedings or put the plainiff under terms, if he insists on proceeding, in order to prevent his obtaining an undue advantage. *Phillips v. Hayward*, 362

5. In an action commenced by bailable process, the Court will not stay proceedings until after the trial of an indictment for perjury founded on the plainiff's affidavit of debt. *Johnson v. Wardle*, 550

6. The Court will stay proceedings in an action if it appears to be doubtful whether the action is brought with the knowledge and consent of the plainiff. *Doe d. Baker v. Roe*, 496

STET PROCESSUS.

Payment of the debt and costs

SUBPENA.

after a peremptory undertaking given, is a ground for having it discharged; but the plainiff cannot be compelled to enter a *stet processus*. *Shrimpton v. Carter*, 648

STRIKING OUT (COUNTS).

See AMENDMENT, 1.

STRIKING OUT (PLEA).

See PLEA (STRIKING OUT)—PLEA, 16.

SUBPENA.

1. A rule for an attachment against a witness for disobedience to a *subpoena*, will not be granted, where it clearly appears that his presence upon the trial would have been of no use to the party subpoenaing him. *Dicas v. Lawson*, 427

2. In order to subject a witness to an attachment for not obeying a *subpoena*, it must appear that he was called on it. *Re v. Stretch*, 368

3. Upon a motion for an attachment against a witness (for disobedience to a *subpoena*) in not attending at the trial, an affidavit that she was called three times in open Court is sufficient, without alleging that she was called upon the *subpoena*. *Dixon v. Lee*, 259

4. A witness is entitled to her reasonable expenses for travelling in the mode suited to her station of life and the particular circumstances in which she may be placed; and therefore where the wife of an innkeeper was subpoenaed to attend a trial at *Lancaster*, which was sixty miles distant by the high road, and fifty by a more direct one, and she was tendered 2*l.* 1*s.*, (the outside fare by the coach by the latter road being only 1*l.* 6*d.*), but it appeared that she had a sick child who must have travelled with her, and the money tendered was insufficient if she travelled inside, a rule for an attachment against her was discharged, but without costs, as she

SUBPOENA.

took the money tendered, and made no objection at the time. *Dixon v. Lee*, 260

5. A rule for an attachment against a witness will be discharged with costs, if it is denied that the original was shewn at the time of service. *Jacob v. Hungate*, 456

6. It is not indispensably necessary, that when a witness is called on his subpoena, the officer of the Court should hold the writ in his hand; it is sufficient that the writ should be exhibited in Court, and the officer call him three times. *Rex v. Fenn*, 546

7. A witness is bound to attend in Court himself, pursuant to his subpoena; and it is no excuse for not attending that the person whom he employed as his agent to watch the proceedings of the Court neglected to give him notice in due time. *Ib.*

SUMMARY RELIEF.

See OUTLAWRY, 2.

SUMMONS.

See ATTORNEY'S BILL, 1.

SUNDAY.

See ARREST, 1.

An attorney is not within the 29 Car. 2, c. 71, s. 1, which prohibits certain persons from doing any work of their ordinary calling on the Lord's day. An attorney, who, acting on behalf of his client, agrees to become personally responsible for part of the debt owing by him, does not thereby do any work of his ordinary calling within the meaning of that act. *Peate v. Dickens*, 171

TAXATION.

See AFFIDAVIT, 1—ATTACHMENT, 5—ATTORNEY'S BILL, 3—COGNOVIT, 2—COSTS—DOCUMENTS (ADMISSION OF), 2—EXECUTOR, 3—JUDGE'S CERTIFICATE—MASTER'S DISCRE-

TOLLS.

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TION, 1—MERITS, 5—PAYMENT INTO COURT, 1—PLEA, 10—SLANDER.

Where upon the taxation of an attorney's bill, a sum was deducted, being the costs occasioned by commencing an action in an improper form, which was afterwards brought in a proper form, and in consequence of that deduction a little more than a sixth was taken off:—*Held*, that the client was entitled to the costs of taxation. *Morris v. Parkinson*, 744

TENDER.

A plea of tender will not be allowed in an action for unliquidated damages. *Barrett v. Dearle*, 13

TERMS NOTICE.

A term's notice of proceeding is not necessary after the lapse of four terms if the delay has taken place at the defendant's request. *Evans v. Davies*, 786

TESTE OF WRIT.

See SCIRE FACIAS, 4.

1. The omission of the day of the month in the *teste* of the copy of the writ, though the month itself is named, is fatal. *Perring v. Turner*, 15

2. A *ca. sa.* is irregular, if it is tested before the time of signing judgment. *Peacock v. Day*, 291

TIME (CALCULATION OF).

See DECLARATION—EXCHEQUER OFFICE—JUDGMENT FOR WANT OF A PLEA, 3, 4—PLEADING (TIME FOR).

Semble, that the word "till" is inclusive of the day to which it is prefixed. *Dakins v. Wagner*, 535

TITHES.

See AMENDMENT, 1.

TOLLS.

See MAGISTRATES' JURISDICTION.

TREASURY.

See ESTREAT.

TRIAL.

See COSTS (OF FORMER TRIAL)—RECOGNIZANCE TO TRY—WRIT OF TRIAL.

TROVER.

See PAYMENT INTO COURT, 3—PLEAS (SEVERAL), 1—PLEA, 24.

TRUSTEE.

See STAYING PROCEEDINGS, 1.

UNDER-SHERIFF.

See SERVICE OF RULE, 1—SHERIFF.

If an under-sheriff withholds his notes taken on a writ of trial after the Court has required their production, he may be compelled to pay the expenses caused to the parties by their non-production; but he is not answerable for his agent's conduct in withholding them, unless it is shewn that the latter acted under his direction. *Metcalf v. Purry*, 93

UNDERTAKING.

See ATTACHMENT, 17.

UNIFORMITY OF PROCESS ACT.

See AFFIDAVIT OF DEBT, 6—IMPARLANCE, 1, 2—OUTLAWRY, 3, 4, 5—PLEADING (TIME FOR), 2—RESIDENCE OF ATTORNEY, 2—SCIRE FACIAS, 2—SHERIFF, 2.

1. Rule 14 of *Reg. Gen. H. T.* 2 *Will.* 4, has been virtually abrogated by 2 *Will.* 4, c. 39. *Grant v. Gibbs*, 409

2. The expression "putting in special bail," used in the 16th section of that statute, means, the putting in of special bail, and giving notice thereof. *Ib.*

UNNECESSARY PROCEEDINGS.

Where the plaintiff signed an irre-

gular judgment, and on the defendant taking out a summons to set it aside, he informed the plaintiff that the judgment was withdrawn:—*Held*, that the defendant had no right to get an order drawn up for setting aside the judgment, and that therefore he was liable to pay the expense of it. *Hargrave v. Holden*, 176

UNQUALIFIED PRACTITIONER.

1. In order to enable the Court to punish an unqualified person who has acted in the name of an attorney with his knowledge, it is necessary first to shew, under the 22 *Geo.* 2, c. 46, s. 11, that such practice was with the knowledge of the latter. *Re Joseph Hodgson*, 330

2. If such knowledge be proved, on such an application, the Court will direct that he shall be required to shew cause why he should not be struck off the roll, pursuant to the same section, although the party seeking to punish the unqualified person is not desirous of enforcing such a proceeding. *Ib.*

VACATION.

See PLEADING (TIME FOR), 2—RETURN OF WRIT, 1, 2—SHERIFF, 2.

VARIANCE.

See ARREST (OF JUDGMENT)—QUIA TIMET.

A variance between the sheriff's warrant and a *ca. sa.* lodged in his office is immaterial. *Rose v. Tomblinson*, 49

VENDOR AND PURCHASER.

See INTEREST.

VENUE.

See EJECTMENT, 6.

1. If the plaintiff, being an attorney, does not sue as such, but appears by another attorney, the defen-

dant may change the *venue* as a matter of course, on the usual affidavit. *Lowless v. Timms*, 707

2. Where a defendant had changed the *venue* to the county where the cause of action arose, it was held to be no reason for bringing back the *venue*, that the action was for the balance of an election dinner, and that the defendant was treasurer of the county, and an electioneering agent, and a person of great influence there, it being a special jury cause. *Hill v. Payne*, 695

3. In an action on the case for a libel published in a county newspaper, called the *Liverpool Chronicle*, the *venue* having been changed by the defendant upon an affidavit that the cause of action arose in the county of *Lancaster* and not elsewhere, and upon special grounds as to residence of witnesses, the Court refused to bring back the *venue* to the former county, upon an affidavit that the plaintiff had eight witnesses in *London*, and that notice of trial had been given and briefs prepared; it appearing that several witnesses for the defendant lived at *Liverpool*, and the defendant agreeing to withdraw the general issue, rely upon his plea of justification, and furnish the plaintiff with a copy of the newspaper. *Green-slade v. Ross*, 697

4. The improper introduction of a *venue* in a declaration, contrary to 8 *Reg. Gen. H. T. 4 Will. 4*, is not a ground of demurrer, but of application to a Judge to strike it out. *Fisher v. Snow*, 27

5. *Seemle*, that the *venue* may now be changed in a local action. *Briscoe v. Roberts*, 434

6. An allegation that an impartial trial cannot be had, must be satisfactorily made out to induce the Court to interfere. *Ib.*

7. In an action for a libel published in a country newspaper, which

circulated in several counties, the Court set aside a Judge's order for changing the *venue*. *Clementson v. Newcomb*, 425

8. The improper introduction of a *venue* into a declaration, contrary to the rules of *H. T. 3 & 4 Will. 4, c. 42*, is no ground for setting aside the declaration, the proper course being to apply to a Judge at Chambers to strike it out. *Townsend v. Gurney*, 168

9. Where a rule for changing the *venue* has been obtained on the common affidavit, in a case in which the *venue* can only be obtained on special grounds, and a rule is obtained for bringing back the *venue*, it will be no answer to the latter rule to shew that there are special grounds for keeping the *venue* at the place to which it has been changed; but those grounds must be made the subject of an independent motion for changing the *venue* in the first instance. *Dawson v. Bowman*, 160

10. Where part of the cause of action arises on a bill of exchange, the *venue* cannot be changed on the common affidavit; but in such a case the *venue* can only be changed under special circumstances. *Walthew v. Syers*, 160

11. In an action on a promissory note, and for goods sold and delivered, the defendant cannot change the *venue* without disclosing his ground of defence, and his application cannot be made before plea pleaded. *Parmeter v. Otway*, 66

12. If a defendant applies to change the *venue* after plea, the *onus* of shewing special grounds for the change lies on him. *Higgins v. Houseman*, 549

VERDICT.

See COSTS (OF FORMER TRIAL)—DISCONTINUANCE—JUDGES' NOTES.

1. Where a verdict was found in trespass against one only of several

defendants, the evidence applying equally to all, but no leave was given at the trial to move for leave to enter a verdict against the other defendants:—*Held*, that a verdict could not be entered against them. *Starling v. Cozens*, 786

2. A cause was referred at the assizes, and by consent a verdict was entered for the plaintiff, damages 50*l.*, costs 40*s.*, subject to the award of an arbitrator. The time for making the award expired without an award being made; the time was further enlarged by consent, and the enlarged time having also expired without an award being made, the plaintiff gave notice of trial, and proceeded to the trial of the cause, and obtained a verdict. A Judge's order having been previously obtained for altering the record in the *distringas*, the clerk of assize at the trial erased the indorsement of the previous verdict, and entered the new verdict in the usual way. The Court set aside the latter verdict for irregularity. *Evans v. Davies*, 786

VERIFICATION.

See PLEA, 19—REFLEADER.

VERIFICATION (AFFIDAVIT OF).

See PLEA OF PRIVILEGE.

WAIVER.

See AMENDMENT, 5—ARBITRATION, 4—ATTACHMENT, 6—ATTORNEY (CHANGING)—ATTORNEY'S BILL, 2—BAIL, 5—BAIL-BOND, 5—COUNTY COURT, 1—IRREGULARITY—JUDGMENT—MISNOMER, 1, 2—OUTLAWRY, 3—PRISONER, 1—RE-SIDENCE (OF ATTORNEY), 1—SECURITY FOR COSTS, 1, 5—TERM'S NOTICE.

Taking out a summons for time to plead is a waiver of a rule to plead. *Nuge v. M'Donell*, 579

WRIT OF RIGHT.

WARRANT OF ATTORNEY.

See AFFIDAVIT (ENTITLING), 3.

Since the rules of *H. T. 4 Will. 4*, s. 1, *reg. 3*, it is not necessary, in order to sign judgment on an old warrant of attorney, to shew that the defendant was alive within the term. *Robinson v. Lester*, 531

WELSH JURISDICTION.

Upon a plea of *nul tiel record* to a declaration in *scire facias* in the *Exchequer*, on a judgment obtained in the Court of Great Sessions for *Wales*, before the passing of the 11 *Geo. 4* & 1 *Will. 4*, c. 70, the plaintiff is entitled to the judgment of the Court upon producing the certificate, and affidavit of the record being in the hands of the officer, in pursuance of the rules of *M. T. 1 Will. 4*, though the actual judgment is not in Court. *Howell v. Brown*, 805

WITNESS.

See NEW TRIAL, 2, 3—SUBPENA.

No conduct money need be tendered to a witness in town in a town cause. *Jacob v. Hungate*, 456

WITNESS (ATTESTING).

See LANDLORD AND TENANT.

WITNESS (EXPENSES OF).

See MASTER'S DISCRETION, 2—SUBPENA, 4.

WITNESS (FOREIGN).

See FOREIGN WITNESS, 1, 2, 3—INTERROGATORIES, 1, 2.

WITHDRAWING RECORD.

See COSTS OF THE DAY, 2.

WRIT.

See ATTORNEY AND CLIENT, 1.

WRIT OF RIGHT.

1. Where a knight summoned to try a writ of right did not appear,

WRIT OF RIGHT.

the Court was willing to allow the parties in the cause to have it tried with three knights only, on their agreeing to waive the error which would appear on the record. *Carne v. Nicoll*, 115

2. *Semble*, that when one knight has made default, the Court will not proceed to call over the names of the rest of the grand assize. *Ib.*

WRIT OF TRIAL.

See JUDGMENT AS IN CASE OF A NON-SUIT, 3, 5, 6, 7, 11, 12, 13—NEW TRIAL, 4.

1. Where application to put off a trial before the under-sheriff was made after the jury were sworn, on the ground of the absence of a material witness, and refused, the Court

WRIT OF TRIAL. 875

would only grant a new trial on payment of costs. *Packham v. Newman*, 165

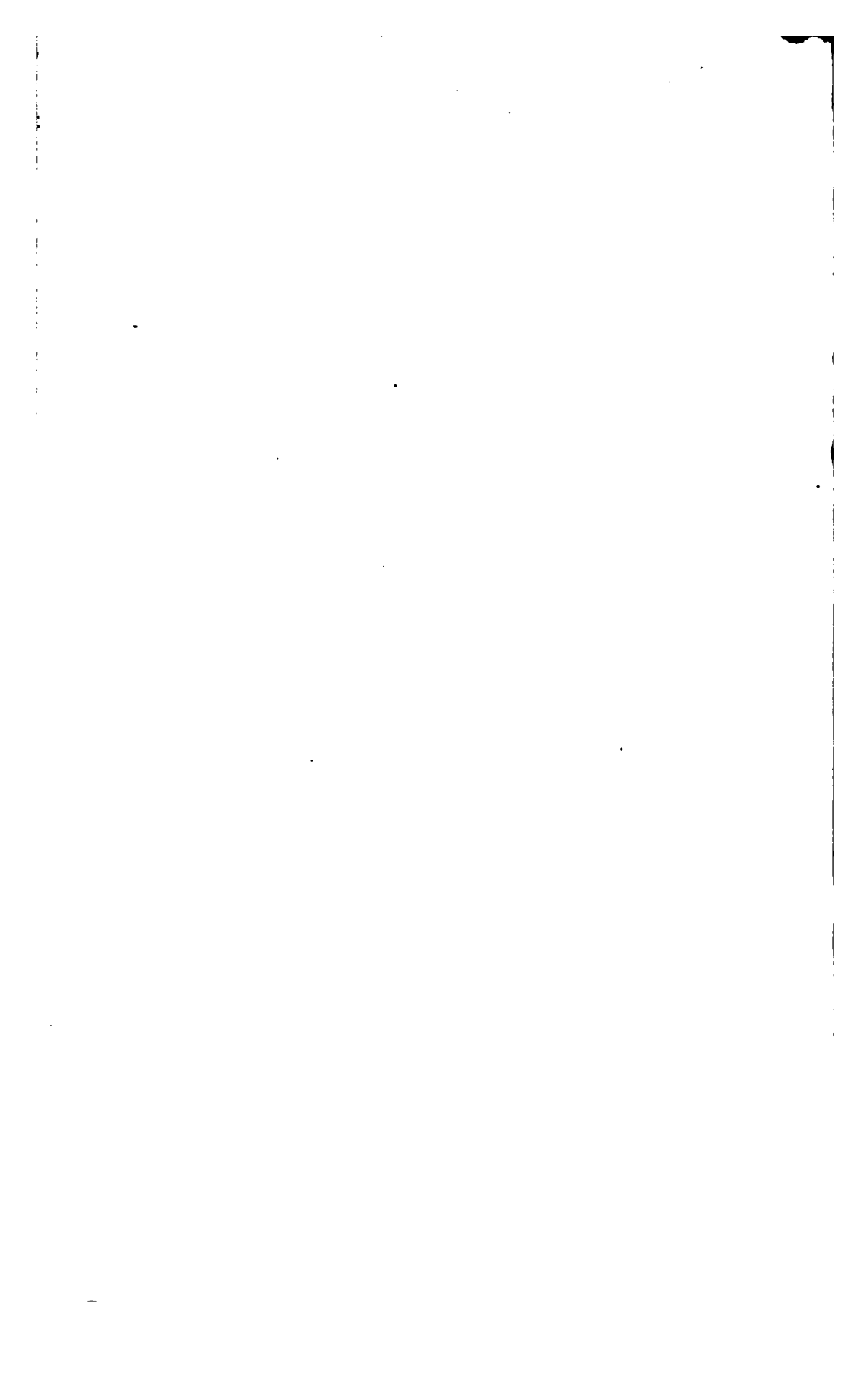
2. *Quære*, whether the under-sheriff, under the Writ of Trial Act, has power to postpone a cause, or whether the application must not be made to a Judge? *Ib.*

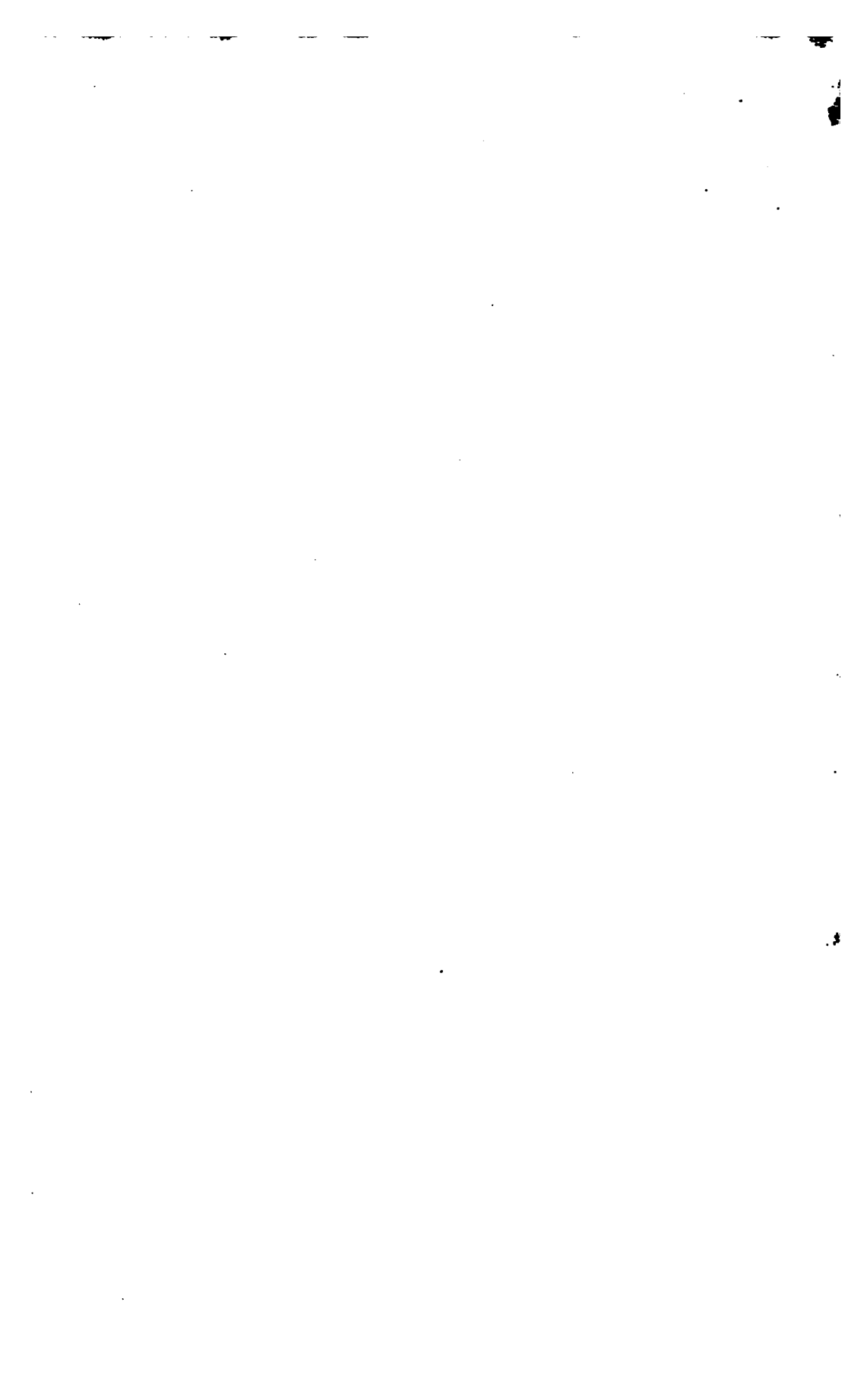
3. Upon trials before the sheriff, neither party is entitled to the sheriff's notes for the purpose of making a motion for a new trial. *Vickers v. Cook*, 492

4. On a motion for a rule *nisi* to set aside the verdict found on a trial before the sheriff on a writ of trial, the Court, under special circumstances, will not require the production of the sheriff's notes, if the motion be made by counsel engaged at the trial. *Barnett v. Glossop*, 625

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